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Supreme Court of the United States

OCTOBER TERM, 1967

No. 722

CAPTAIN DALE E. NOYD, FR28084,

Petitioner,

—v.—

HONORABLE ROBERT S. MCNAMARA, Secretary of Defense; HONORABLE HAROLD W. BROWN, Secretary of the Air Force; GENERAL JOHN P. MCCONNELL, Chief of Staff, United States Air Force; LIEUTENANT GENERAL THOMAS S. MOORMAN, Superintendent, United States Air Force Academy; MAJOR GENERAL G. B. GREENE, JR., Assistant Deputy Chief of Staff/Personnel for Military Personnel, United States Air Force; LIEUTENANT GENERAL LEWIS B. HERSHEY, National Director, Selective Service System; COLONEL JOHN E. HORNE, Deputy Chief of Staff, Personnel, United States Air Force Academy; COLONEL HENRY E. WOJDYLA, Head, Department of Psychology and Leadership, United States Air Force Academy; BRIGADIER GENERAL ROBERT MCDERMOTT, Dean of Faculty, United States Air Force Academy,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above entitled case on May 16, 1967.

Citations to Opinions Below

The March 29, 1967 opinion of the United States District Court for the District of Colorado, Hon. William E. Doyle, U. S. D. J., granting, in part, petitioner's motion for a preliminary injunction, is reported at —— F. Supp. ——, and is printed in the Appendix, *infra*, p. 1a. The April 25, 1967 opinion of the District Court, per Judge Doyle, after trial, dismissing the complaint on jurisdictional grounds, is reported at 267 F. Supp. 701, and is printed in the Appendix, *infra*, p. 4a. The Per Curiam opinion of the Court of Appeals for the Tenth Circuit, affirming the District Court, is reported at 378 F. 2d 538 (1967), and is printed in the Appendix, *infra*, p. 19a.*

Jurisdiction

The judgment of the Court of Appeals was entered on May 16, 1967. On August 10, 1967, Mr. Justice Fortas issued an order extending the time in which to file this petition for a writ of certiorari up to and including September 13, 1967, and on September 13, 1967, Mr. Justice Fortas further extended such time up to and including October 13, 1967. The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

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* References to material printed in the Appendix will hereinafter appear as "App. —— ".

Statement of Questions Presented

1. Petitioner is an Air Force officer who became a conscientious objector after eleven years of honorable service, and whose application for recognition as a conscientious objector and either discharge or reassignment to duties not conflicting with his conscience, was denied by his military superiors. Must petitioner commit a crime and submit to a military court martial before gaining Federal Court review of his constitutional claims?

(a) Whether the courts below properly held that they were without jurisdiction on the grounds that petitioner had not exhausted his administrative remedies.

(b) Whether such a rule of exhaustion violates the principle expressed by this Court in *Dombrowski* v. *Pfister*, 380 U. S. 479 (1965) and other cases which condemn unfounded procedural obstacles to the exercise of constitutional rights under the First Amendment.

(c) Whether the holdings of the courts below that an in-service conscientious objector claimant is not entitled to the same judicial review on habeas corpus as a Selective Service registrant whose conscientious objector claim has been denied, is a violation of the equal protection guarantee of the Fifth Amendment.

2. Whether petitioner's application for conscientious objector status, based upon religiously motivated objection to a particular unjust war, was within the standards and criteria of AFR 35-24, and its statutory basis, Section 6(j) of the Universal Military Training and Service Act, 50 App. U. S. C. §456(j).

(a) Whether the position taken by the Secretary of the Air Force, that conscientious objector status is barred to any claimant who is not a universal pacifist is a correct reading of the applicable statute, regulations and decisional law.

(b) Whether a denial of petitioner's claim on the grounds that his religious beliefs compel opposition to participation in unjust wars but not to all wars is a violation of the religious liberty clause of the First Amendment and the due process clause of the Fifth Amendment.

3. Whether the procedures established by the applicable Air Force Regulation, AFR 35-24, for the processing, evaluation and determination of applications for conscientious objector status are so lacking in the minimum requirements of procedural due process that petitioner was deprived of his constitutional rights under the Fifth Amendment.

4. Whether the denial of petitioner's application was unlawful and void because of the failure by the Air Force to adhere to the requirements of its own regulations governing the processing of such application.

Constitutional and Statutory Provisions and Air Force Regulations Involved

This case involves the due process clause of the Fifth Amendment and the religious liberty and establishment of religion clauses of the First Amendment.

The statute most closely involved is that which expresses national policy on conscientious objection to participation in military service, Section 6(j) of the Universal Military Training and Service Act of 1950, as amended, 50 App. U. S. C. §456(j). At all times pertinent* to this case, it read as follows:

> "(j) Nothing contained in this title [sections 451-454 and 455-471 of this Appendix] shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title [said sections], be assigned to noncombatant service as defined by the

* Certain amendments to §6(j) effected by the Military Selective Service Act of 1967, are not applicable to this case.

President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) [section 454(b) of this Appendix] such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate. . . . Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title [said sections], he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) [section 454(b) of this Appendix] such civilian work contributing to the maintenance of the national health, safety, or interest as the

local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title [section 462 of this Appendix], to have knowingly failed or neglected to perform a duty required of him under this title [sections 451-454 and 455-471 of this Appendix]. If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board. Each person whose claim for exemption from combatant training and service because of conscientious objections is sustained shall be listed by the local board on a register of conscientious objectors."

Many provisions of Air Force Regulations are involved. The principal regulation is AFR 35-24, entitled "Disposition of Conscientious Objectors". It is set forth in full in the Appendix, App. 23a.

Statement of the Case

Petitioner is an Air Force Captain who became "a conscientious objector to wars of aggression, particularly to the Vietnam conflict," 378 F. 2d at 538, App. 20a after 11 years of honorable service, while he was assigned as Assistant Professor of Psychology at the Air Force Academy. Petitioner's conscientious beliefs were set forth in detail in the complaint, and exhibits A to K attached

thereto (R. 29-76),* all of which were received in evidence and were the subject of considerable testimony in the proceedings below. They were perhaps best summarized by District Judge Doyle in his opinion of March 29, 1967, as follows:

> "... he holds a philosophy which he declares as 'ethical humanism' which dictates these scruples against war ... he does not object to all war ... he objects rather to particular wars of aggression, but specifically to the Vietnam War and that he would not be a conscientious objector if it were a matter of defending the United States. He doesn't rule out the possibility that he would go to foreign countries first in order to carry out an assignment of defending the United States." —— F. Supp. at ——, App. 1a.

Petitioner made application under appropriate regulations for resignation from the Air Force, both in the best interests of the Air Force under Air Force Regulation (hereinafter "AFR") 36-12, and on specific grounds of conscientious objection under AFR 35-24, App. 23a. Both applications, as well as the text of AFR 35-24, were attached as Exhibits A, B and C to the complaint. The applications specified that petitioner sought either acceptance of his resignation, or reassignment to duties not in conflict with his conscientious position. Both applications were denied and petitioner, a former fighter pilot, received orders assigning him to the 27th Tactical Fighter Wing, Cannon Air Force Base, New Mexico, for upgrade training in F-100 jet fighter aircraft. "This aircraft is currently being used

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* References to the transcript of the record will appear as "R. ——."

in Vietnam, and the probability is strong that anyone receiving training at Cannon can anticipate transfer to the combat zone." 267 F. Supp. at 705, App. 10a.

Prior to the effective date of such transfer order, April 1, 1967, petitioner and his counsel made various attempts to confer with superior military and civilian Air Force officials for the purpose of obtaining a reassignment which would not be in conflict with his conscience and which would thereby preclude this litigation. All of these futile efforts were set forth in detail in the complaint.

On March 27, 1967 this action was instituted in the United States District Court for the District of Colorado, seeking declaratory judgment, injunctive relief, relief in the nature of habeas corpus, and ancillary relief. In essence, Capt. Noyd's grievance below was threefold:

1. His application for recognition as a conscientious objector, and either separation or appropriate reassignment, was improperly and discriminatorily denied by the Air Force, in violation of his constitutional rights and relevant statutes and regulations.

2. AFR 35-24, which specifies the manner in which applications for conscientious objection are processed, evaluated and adjudicated, is unconstitutional, both on its face and as applied to petitioner, in that it is totally devoid of the minimum standards of procedural due process.

3. The Air Force failed to follow its own promulgated regulations, and violated the specific provisions of AFR 35-24, par. 6a, App. 25a, in that petitioner's commanding officer, the respondent General Moorman, failed to indicate the reasons for recommending disapproval of appellant's application.

On March 27th, simultaneously with the filing of the complaint, a motion was made seeking preliminary injunctive relief; specifically, that respondents should be restrained from executing their anticipated order of assigning petitioner to fly fighter aircraft in Vietnam, or to train therefor, or to other duty in conflict with his conscience, prior to the determination of this action by the Court. The Court heard extensive argument by counsel, and, on March 29th, handed down its opinion, stating in essence:

> "I have determined that a preliminary injunction should issue against assigning the plaintiff to combat activity or requiring him to perform duties whereby he will be perhaps faced with the necessity of a General Court Martial or other proceedings which might injure him as a practical matter . . . accordingly, the injunction, or restraining order which is entered is against requiring the plaintiff, until the further order of the Court and until a hearing on the merits can be had, to perform combat-type activity, directly or indirectly." —— F. Supp. at ——, App. 3a.

On March 31, 1967, the Court signed an order incorporating this direction, and further ordering "that this matter is set for hearing on the merits on Wednesday, April 19, 1967."

On April 19, 1967, respondent moved to dismiss for lack of jurisdiction, and for summary judgment, and, specifically, to bar petitioner from introducing any testimony in support of the merits of his case. The Court denied the motion to bar, reserved decision on the substantive motions, and allowed petitioner to proceed with testimony.

Petitioner's first witness was Chaplain Captain Donald B. Clapp, an Episcopal Minister who had formerly been assigned as Protestant Chaplain at the United States Air Force Academy, and who was currently en route to reassignment in Southeast Asia (R. 472). Chaplain Clapp testified that petitioner had approached him for pastoral advice and counseling in connection with his conscientious objector claim; that he had read the various applications, letters and supporting documents; that he had spent many hours in lengthy discussions with petitioner concerning his claim of conscientious objection, its religious basis, and all of the ramifications thereof; and that he regarded petitioner as utterly and unequivocally sincere in his application, and as thoroughly religious in his motivation (R. 478). He testified specifically that there was not the slightest question in his mind but that Capt. Noyd was acting out of deep conscientious conviction, and not out of fear, cowardice, desire to avoid a hazardous assignment, or any other motive (R. 478-479).

Chaplain Clapp testified further that he had discussed Capt. Noyd's conscientious objector claim with both Chaplain Lt. Col. Hofstad, the senior base Protestant Chaplain (R. 480), and with Chaplain Lt. Col. Hesseldence, the base chaplain (R. 487), and that after such discussions his views concerning petitioner were held "even more strongly" (R. 488).

Inasmuch as all of petitioner's applications and supporting documents were accepted in evidence (plaintiff's Exhibits A-K below), petitioner's testimony did not seek to systematically reiterate the presentation of his case. However, he did rebut the innuendo contained in the memorandum submitted and oral argument made by counsel for

the Government, to the effect that he did not submit his applications until after he was advised, in November, 1966, that he had been ordered reassigned to flying duty in June of 1967. Petitioner testified and a document was marked for identification (Ex. P) in support of this testimony, that he had made his decision to seek conscientious objector status in the early fall of 1966, and had consulted American Civil Liberties Union counsel in Denver and New York prior to his being informed of the updating of his "return to cockpit" (R. 561). At the time petitioner made his decision he had no reason to believe that his tour of duty at the Air Force Academy would have ended prior to June of 1968, the completion of a normal five-year faculty assignment. Capt. Noyd also clarified the precise nature of his conscientious objection to participation in the Vietnam War, and stated that he would be available to accept any duty assignment, anywhere in the world, however remote and however hazardous, except for assignments which would directly or indirectly involve his participation in the Vietnam War, in violation of his conscience (R. 578-579).

Three "distinguished theologians and philosophers," 267 F. Supp. at 705, App. 11a, were qualified as expert witnesses and testified on behalf of petitioner. They were:

> *Dr. Paul Kurtz,* Professor of Philosophy at the State University of New York at Buffalo, Chairman of the editorial board of *The Humanist* (the periodical publication of American Humanist Association), author of *Decision and the Condition of Man* (University of Washington Press, 1965), and several other books, and editor of *Humanist Ethics* (a collection of essays by

leading theologians and philosophers being published by Prentice Hall this year).

Dr. Robert C. Kimball, Professor of Theology at the Starr King School for the Ministry at Berkeley, California, Unitarian and Congregational Minister, formerly lecturer at Harvard Divinity School, editor of *Theology of Culture* (Oxford University Press, New York 1959), and Literary Executor of the Estate of Paul Tillich.

Dr. Robert McAfee Brown, Professor of Religion at Stanford University, formerly Professor of Religion at Union Theological Seminary, author of *The Spirit of Protestantism* (Oxford University Press 1961) and (with Gustave Weigal, S.J.) *An American Dialogue* (Doubleday), and other books, member of the editorial boards of *Christianity and Crisis* and *The Journal of Ecumenical Studies,* holder of honorary doctorates from Notre Dame, Boston University, Loyola, University of San Francisco, Amherst and Lewis and Clark University, and official observer for the World Alliance of Reformed and Presbyterian Churches to the Second Vatican Council.

Each expert witness testified, with respect to the facts of this case, from personal familiarity with the petitioner's applications and from personal interviews with Captain Noyd which were arranged for the purpose of the expert being called a witness in this case.

Dr. Kurtz testified that Religious Humanism is rooted in the deepest traditions of the West, in the humanism prevalent in the Christian religion, and in such other major religions as Buddhism and Confucianism (R. 494). Peti-

tioner's applications, he testified, and the background and beliefs expressed in his total position, identify him as a genuine participant in this religious tradition (R. 497).

Dr. Kimball described the meaning of religion, as it is captured in Tillich's dictum that that which is a man's ultimate concern is God for him (R. 508). The evidence that petitioner's conscientious objections are religious, he stated, are to be found both in his sincerity and in his courage, the two being central to the Tillichian concept (*vide*, Tillich, *The Courage to Be*) (R. 512).

Dr. Brown testified that what is or is not religious might properly be tested in terms of the root of the word "religion" (Latin: *religare*, to bind fast) from which it may be defined as "that to which one binds himself" (R. 526). Religion is found, not just in what one says—in rituals and creeds—but in the degree of congruence between expressed statements of belief and what one does with his life. Dr. Brown found a commitment authenticating his words in petitioner's life and deeds which led him to conclude that his position is clearly based on religious training and belief (R. 527, 546).

On the subject of the religious man's participation in war, Dr. Brown identified several separate strains or traditions of religious thought within Western religions (R. 543 et seq.). He pointed out that these traditions sometimes cut across denominational or sectarian lines; for instance, the Jehovah's Witnesses partake of both the "pacifist" and the "crusade" traditions which are, in a sense, the opposite extremes of the total spectrum of views presented by these peace-war traditions (R. 545).

Dr. Brown emphasized the number of modern religious leaders and denominational bodies which had expressed themselves on the import of religious teachings for the religious man's participation in war. He pointed out, for instance, that the most recent pronouncements of Pope Paul VI approach the verge of describing the very war to which petitioner objects in conscience as an unjust war, and he described the commitment of the Catholic Church and of several American Protestant denominations to support the conscience of those who find that they cannot participate in war or in a particular war (R. 536 to 537, 539 to 542).

All three expert witnesses testified that the differences between universal pacifism and discriminating pacifism, religiously, is confined to the content of their religious beliefs. It does not extend to their religious quality. Both are equally religious, in every sense of the word; neither is more "political" than the other. Neither can be said to belong to a more ancient or venerable religious tradition than the other. Dr. Kimball pointed out that both the universal pacifist and the discriminating objector have general principles which each must apply discriminately, in particular circumstances. (The universal pacifist, for instance, must discriminate among various of his individual actions, such as paying taxes, in terms of whether they amount to participation in war. R. 517.) Dr. Brown stated that, if the law were to exempt universal pacifists while denying exemption to discriminating ones, it would discriminate religiously—by *content* of belief—against some religious views and in favor of others (R. 542 to 543).

At the conclusion of the testimony presented on April 19th, plaintiff rested (R. 580). Defendants likewise rested,

expressly declining to offer any testimony (R. 580). The District Court reserved decision. On April 25, 1967 the Court handed down its opinion holding that it did not have jurisdiction, essentially on grounds of non-exhaustion.* With respect to the merits, Judge Doyle wrote:

> "We do not reach the merits of plaintiff's case and hence we do not deny his sincerity or review his particular basis for claiming that he is a conscientious objector." 267 F. Supp. at 708, App. 18a.

The Court's order of April 27, 1967 dismissed the complaint on jurisdictional grounds and dissolved the injunctive order previously issued.

Notice of appeal was timely filed in the Court of Appeals for the Tenth Circuit, and a stay was granted pending appeal, pursuant to the All Writs Statute, 28 U. S. C. §1651(a), over the respondents' objections. Submission of briefs and oral argument were accelerated, and on May 16, 1967 the Court of Appeals affirmed the District Court, 378 F. 2d 538, App. 19a, but continued the stay for a period of ten days to allow time for a stay application pending certiorari to be made to this Court. An application for a stay of the mandate of the Tenth Circuit was timely presented to Mr. Justice White, as Circuit Justice for the Tenth Circuit, and denied on June 2, 1967.

Although not included in the record below, the Court may wish to be informed of subsequent factual developments.

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* This was directly contrary to the Court's March 29th opinion which held "there is probable jurisdiction shown justifying the granting of some kind of relief." —— F. Supp. ——, App. 3a. Exhaustion and other aspects of the jurisdictional question are discussed in Point I, *infra*.

Petitioner has been at Cannon Air Force Base, Clovis, New Mexico, since April 1, 1967, in obedience to the military orders which transferred him there from his previous assignment as Asst. Prof. of Psychology at the Air Force Academy. While he was under the protection of injunctive orders of the District Court and Court of Appeals, he was assigned to various non-combatant duties, including principally that of Base Housing Officer. In a further attempt to exhaust every conceivable Air Force administrative remedy, he submitted, on June 19, 1967, a new application for resignation or reassignment as a conscientious objector, and attached thereto, as further evidence of his religious beliefs, and the sincerity with which he held them, the transcript of the testimony heard in the District Court.

This application received favorable recommendations from the Chaplain who interviewed Capt. Noyd, pursuant to the provisions of AFR 35-24, and also from his commanding officer, Col. William A. Hoy, Jr., Commander of the 832d Combat Support Group at Cannon Air Force Base. Col. Hoy's recommendation reads, in part:

> "Captain Noyd is completely sincere, honest, and forthright in his objections to the Vietnam conflict on religious grounds. His religion is not of the more conventional or universally accepted faiths. He is a humanist and if the expert opinion of many clergymen has validity then it is a religion in the true sense. In my view he completely meets the criteria of a conscientious objector as outlined in AFR 35-24 and the intent of Congress when they provided for conscientious objector status." (1st Ind. to 832d CSG (SVS/BH) Ltr., 19 Jun. 67, dated 23 June 1967, par. 1d.)

While the application was before the Secretary of the Air Force, a special memorandum was prepared by Capt. Noyd's counsel and submitted to the Secretary. The purpose of the memorandum was to trace the development of decisional law on the question of whether or not conscientious objector status must be confined to universal pacifists, and denied to any applicant who is not a conscientious objector to participation in any and all wars. The memorandum contended that the notion of confining conscientious objector status to universal pacifists resulted from a widely held misreading of the decisional law.*

On August 21, 1967, petitioner was notified that his application was denied by the Secretary, and he was ordered reassigned, effective August 22, 1967 to the 524th Tactical Fighter Squadron of the 27th Tactical Fighter Wing for entry into F-100 recurrency training and upgrade training as an instructor pilot. Shortly thereafter, Capt. Noyd entered upon instructor pilot upgrade training, after having again advised his Air Force superiors that while his conscience does not compel him to refuse such training, it will compel him to refuse to put such training to use, either in Vietnam, or in instructing other pilots bound for Vietnam. On August 28, 1967, Capt. Noyd wrote his Commanding Officer, in part:

> "My humanist beliefs demand that I assume *individual responsibility* for my actions and to bring humanist judgment upon the use of military violence—and especially my contribution to that violence. This personal moral responsibility is unmitigated by the commands of my government or the unpopularity of my beliefs."

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* The arguments contained in the memorandum are digested in Point I of this petition, *infra*.

"I am not conscientiously opposed to recurrency training in the F-100 or to all flying assignments in that aircraft. I am convinced, however often I attempt to deny it or rationalize it away, that the training of RTU pilots for Vietnam *is* a direct and significant contribution to the war and as such is the same affront to my conscience as killing Vietnamese. . . . If I were to perform duties as an instructor pilot, I could be almost certain that any skills I imparted to a student pilot would soon be employed in the killing of Vietnamese. Doubly tragic would be the constant awareness that any young man whom I would be training may forfeit his life in a cause that I believe to be immoral and worthless."

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"Your orders have now put me in the position wherein it appears that I shall inevitably be confronted with duties—those of instructor pilot—which would violate my conscience. Again these I would be compelled to refuse. . . . I shall, however, if ordered to begin training, attempt to suppress the resultant feelings of anger and futility and to satisfactorily fulfill the assigned duties. This I shall continue to do, as I have both at the Air Force Academy and Cannon AFB until I am up against the wall with an order which violates my conscience and which I shall be compelled to refuse."

Petitioner's training as an instructor pilot is continuing. As of the presentation of this petition, on October 13, 1967, it is anticipated that such training will be concluded, and petitioner assigned duties as an instructor pilot, within a matter of weeks.

Reasons for Granting the Writ

Certiorari should be granted because the Court of Appeals decided important questions of federal constitutional law which should be settled by this Court, particularly since its holdings appear to conflict with applicable rulings of this Court and those of several other courts of appeals.

I.

This case presents the important and substantial question whether an in-service applicant for conscientious objector status, who has exhausted all his administrative remedies, must commit a crime and submit to a military court martial before gaining a federal review of his constitutional claims. At the outset it is important to note that neither of the courts below appear to have questioned the jurisdiction of federal courts to *ultimately* determine the underlying substantive questions.[1] Nor is any question

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[1] The District Court held "for the strict requirement of exhaustion as a prerequisite to jurisdiction." 267 F. Supp. at 707, App. 14a. The Court of Appeals held that petitioner "has not exhausted the military process . . . . ", 378 F. 2d at 539, App. 20a-21a. Thus, neither court said no jurisdiction; they merely said not yet. These holdings are consistent with the now well-established principle that civil courts have habeas corpus jurisdiction, 28 U. S. C. 2241 (1964), to review the constitutionality of actions of military authorities. *Burns* v. *Wilson*, 346 U. S. 137, 139 (1953). See also *Harmon* v. *Brucker*, 355 U. S. 579 (1958); *Orloff* v. *Willoughby*, 345 U. S. 83 (1953). The lower federal courts have regularly exercised this power. See, e.g., *Gallagher* v. *Quinn*, 363 F. 2d 301 (D. C. Cir. 1966); *Reed* v. *Franke*, 297 F. 2d 17, 20 (4th Cir. 1961); *Ashe* v. *McNamara*, 355 F. 2d 277 (1st Cir. 1965); *Palomera* v. *Taylor*, 344 F. 2d 937 (10th Cir. 1965). See particularly, *Gilliam* v. *Reaves*, 263 F. Supp. 378, 384 (W. D. La. 1966). But see also *Brown* v. *McNamara*, 263 F. Supp. 686 (D. N. J. 1967), appeal argued in Third Circuit, Oct. 5, 1967.

raised as to the proper *scope* of federal review.[2] The significant and disputed issue is solely that of determining the point at which this jurisdiction is to be exercised.

A. The determination by the District Court, affirmed *per curiam* by the Court of Appeals, that federal adjudication of petitioner's constitutional claims is precluded by the doctrine of exhaustion of administrative remedies, is erroneous. The decisions below severely misconstrue the nature of the exhaustion doctrine, distort its rationale, and are wholly unsupported by the cases cited in the opinions. Indeed, in *Orloff* v. *Willoughby*, 345 U. S. 83 (1953), this Court impliedly refuted the proposition that submission to a court martial is a necessary element of exhaustion. In deciding that case on its merits, the Court rejected the Government's argument, 345 U. S. at 85, that Dr. Orloff must refuse to perform his assigned duties and assert his claims as affirmative defenses before a court martial proceeding.[3]

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[2] While some question exists as to the proper scope of review of *factual* determinations of military bodies, compare *Ashe* v. *McNamara*, *supra* at 280, with *Palomera* v *Taylor*, *supra*, where pure constitutional questions are presented the federal courts are indisputably empowered to exercise full habeas corpus jurisdiction. *Burns* v. *Wilson*, *supra* at 142; *Shaw* v. *United States*, 357 F. 2d 949, 954 (Ct. Cl. 1966); *Gibbs* v. *Blackwell*, 354 F. 2d 469, 471 (5th Cir. 1965). See also Hart & Wechsler, *The Federal Courts and the Federal System* 1238-39 (1953). The questions decided adversely to petitioner below are all questions of constitutional law. See Statement of Questions Presented, *supra*, p. 3.

[3] This argument, of course, presupposes that the inevitable court martial tribunal will allow petitioner to raise his substantive defenses. No authority is given in support of this proposition in any of the opinions below, and none was provided by respondents in their briefs, other than the suggestion that in a court martial for disobedience of an order, the lawfulness of the order may be raised as a defense. But no cases are cited from military or civil tribunals. Moreover, reliance on a court martial defense will predictably be futile. See transcript of court martial of *United States* v. *Brown*,

A court martial, which is a criminal *judicial* proceeding, is plainly not an element of the *administrative* process. To require exhaustion of such criminal proceedings in no way comports with the purpose of the exhaustion doctrine, which is to permit administrative officials with presumed expertise to render initial judgments concerning matters within their special competence. It is clearly not within the special competence of a court martial to determine the validity of applications for conscientious objector status.[4]

The cases cited by the courts below do not support their rulings. Petitioner is not seeking to collaterally attack, either by way of injunction or by avoiding the normal military review of court martial judgments, on-going criminal court martial proceedings. Thus, *Gusik* v. *Schilder*, 340 U. S. 128 (1950), and similar cases referred to by the District Court (App. 13a-14a) are inapposite. They reflect the routine application of the exhaustion doctrine as applied to criminal proceedings in the military and civil courts alike. This case is an attempt to review an *administrative*, not a criminal proceeding.

Certiorari should be granted to determine whether the essentially administrative process of adjudicating and reviewing conscientious objector applications can be converted by the military into a criminal prosecution.

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tried in Ft. Dix, N. J., on September 18, 1967, where the attempt to introduce the defense of an improper denial of a conscientious objector claim was rebuffed by the law officer.

[4] A doctor or lawyer denied a license by the administrative body charged with issuing licenses is not obliged to set himself up in practice without a license, and suffer arrest, prosecution, and possible incarceration in order to challenge the validity of the denial of his application. Even in the absence of a specific statute authorizing judicial review of the administrative action, there is surely a right to seek judicial relief in advance of prosecution.

B. The proposition that an individual is required to undergo the risks of punishment inherent in a military court martial in order to satisfy the exhaustion doctrine runs counter to the well-developed principle of this Court condemning unfounded procedural obstacles which deter the exercise of constitutional rights under the First Amendment. See, e.g., *Keyishian* v. *Board of Regents*, 385 U. S. 589 (1967); *Dombrowski* v. *Pfister*, 380 U. S. 479 (1965); *Baggett* v. *Bullitt*, 377 U. S. 360, 379 (1964); *N. A. A. C. P.* v. *Button*, 371 U. S. 415, 433 (1963); *Speiser* v. *Randall*, 357 U. S. 513 (1958).

The interest of preserving the free exercise of religious liberty under the First Amendment is no less than that of preventing a chilling effect on the exercise of constitutionally-protected political expression. Cf. *Sherbert* v. *Verner*, 374 U. S. 398 (1963); *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624 (1943); *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940).

The jurisdictional obstacle constructed below in the name of exhaustion can only operate to discourage the free exercise of constitutional rights. It serves no valid countervailing interest of the Air Force. Whether a final judicial determination of the substantive issues is made at this juncture, or after court martial proceedings, should be of little real significance to any valid interest of the Air Force. The very limited disruption of internal military affairs is the same at both points.

If there are any reasons based on military exigencies for delaying judicial review until after court martial conviction, they have not yet been asserted by either the respon-

dents, or, with respect, the courts below.[5] On the other hand, because the risk of punishment will obviously deter the assertion of at least some meritorious claims of conscientious objection, the significant interests protected by our national policy of recognition of conscientious objectors will be the ultimate losers.

Significantly, the Court need not go as far as *Dombrowski* and its progeny warrant. For example, in *Wolff* v. *Selective Service System Local Bd. No. 66*, 372 F. 2d 817 (2d Cir. 1967), a panel comprising Judges Medina, Friendly and Smith ruled that a justiciable controversy was presented by the action of a local draft board in reclassifying registrants who had participated in Vietnam War demonstrations, even though they had not exhausted administrative remedies under the Selective Service Act.[6] Here, there is no necessity to abort an imminent criminal prosecution (as in *Dombrowski*) or to short-circuit a conceded element of the administrative process (as in *Wolff*); nor is there a need even to go as far as *Toth* v. *Quarles*, 350 U. S. 11 (1955) or *Reid* v. *Covert*, 354 U. S. 1 (1957), where this Court saw fit to intrude the judicial power of the United States into *unconcluded* court martial proceedings.

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[5] The Court of Appeals stated that it was "unwilling to expand the *Dombrowski* doctrine", because "To do so would run contrary to established law." 378 F. 2d at 540, App. 21a, and then it cited only pre-*Dombrowski* decisions, *ibid.*, fn. 2.

[6] For other cases where lower federal courts have granted relief without requiring exhaustion of remedies, see *Stamler* v. *Willis*, 371 F. 2d 413 (7th Cir. 1966); *Reed Enterprises* v. *Corcoran*, 354 F. 2d 519, 522 (D. C. Cir. 1965); *Carmichael* v. *Allen*, 267 F. Supp. 985, 993 (N. D. Ga. 1967).

Surely the exercise of federal jurisdiction at the *conclusion* of a military administrative proceeding is less abrasive to civil-military relations than is the intrusion of the federal judiciary into the sensitive realm of federalism through the injunction of state criminal proceedings. In fact, this Court has stated that the traditional autonomy of the military has its exact parallel in state judicial independence, *Gusik* v. *Schilder, supra* at 131-132; *Burns* v. *Wilson, supra* at 140, 142, and, as discussed above, has exercised its jurisdiction in both areas.

Accordingly, certiorari should be granted to clarify the scope of the First Amendment rights protected by the *Dombrowski* doctrine, and to review the "exhaustion" rule propounded below—which, if allowed to stand, could severely compromise the power of the federal courts to determine the constitutionality of military administrative proceedings.

C. Certiorari should also be granted to determine whether under the decision of the Court of Appeals, servicemen who apply for conscientious objector status are denied the equal protection of the laws under the Fifth Amendment. Cf. *Bolling* v. *Sharpe*, 347 U. S. 497 (1954).

By requiring a conscientious objector applicant to submit to court martial proceedings as a prerequisite to federal review of his constitutional claims, the courts below have exceeded even the harsh exhaustion requirements that have been applied under the Universal Military Training and Service Act, 50 App. U. S. C. §451 et seq. (1964). A Selective Service registrant may elect to submit to induction and immediately file a petition for habeas corpus. He need not risk criminal punishment. *Gibson* v. *United States*,

329 U. S. 338, 359 (1946); *Watkins* v. *Rupert*, 224 F. 2d 47 (2d Cir. 1955).

The equal protection guarantee forbids distinctions which are arbitrary and do not embody a proper legislative or administrative purpose. *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 78-79 (1911); *Barbier* v. *Connolly*, 113 U. S. 27, 31-32 (1885).

Judged by this standard there is no rational basis for distinguishing between conscientious objector claims by in-service personnel and those by Selective Service System registrants that would justify the vast difference in treatment. The mere fact that an individual finds himself within the military establishment at the time his conscientious objector beliefs mature does not justify the imposition of greater obstacles to the assertion of constitutional rights than those imposed upon his civilian counterpart.[7]

Because a bona fide acquisition of conscientious objector views can legitimately occur after an order to report for induction, *United States* v. *Gearey*, 368 F. 2d 144 (2d Cir. 1966),[8] or even after induction, AFR 35-24, Section A, Paragraph 3a, it is an unreasonable and discriminatory classification to hold that the latter are not entitled to civil judicial review.[9]

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[7] Any distinction between draftees and enlistees based on the enlistees' supposed "voluntary" entry into the military is palpably fictitious since "a high proportion of all these volunteers in the services—about four out of ten in the years before Vietnam according to Department of Defense estimates—are motivated by the existence of the draft." *Report of the President's National Advisory Committee on Selective Service* 11 (1967).

[8] *Gearey* assumes an equality of treatment of pre-induction and post-induction claimants. 368 F. 2d at 149-150, nn. 10-11.

[9] The Tenth Circuit, in its decision below, is the first Court of Appeals to affirm a holding that an in-service conscientious ob-

II.

Certiorari should be granted to determine if an otherwise fully qualified conscientious objector claimant may be barred from such status because of a refusal to oppose all wars. Such law as there is to the contrary reflects a widely-held erroneous reading of a single decision, and transgresses on constitutional limitations.

Petitioner's application for separation from the Air Force or reassignment as a conscientious objector, and the undisputed evidence adduced at the District Court Hearing below, amply establish his qualification as a conscientious objector for the relief contemplated in AFR 35-24.

Only the Air Force Secretary's view that the Regulation, and its statutory analogue in Section 6(j) of the Universal Military Training and Service Act (UMTSA)[10] apply only to persons opposed to all wars, is in dispute. The inference that this view was the sole basis for the denial of petition-

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jector applicant is not entitled to the same habeas corpus judicial review as a Selective Service applicant concededly receives under habeas corpus. Certain District Court decisions which support this view are cited by the District Court in its opinion below, 267 F. Supp. at 706, App. 13a-14a. See, however, *Gilliam* v. *Reaves*, 263 F. Supp. 378 at 384 (W. D. La. 1966): "... in our judgment, the scope for reviewing the action of a Selective Service board by habeas corpus is identical to that to be applied in reviewing the action of the army." See also *Christensen* v. *Hedrick*, unreported, Civil No. 45613, U. S. D. C., N. D. Calif., where Judge Weigel stated in colloquy at page 28 of the transcript:

> "But this Court is not lightly going to hold, because of its belief in fair play . . . that a decision can be made through an administrative process for which there's absolutely no factual basis."

[10] 50 USC App. §456(j). AFR 35-24 provides, in Section A, Paragraph 3, a, that, "Claims of conscientious objection by all persons, whether existing before or after entering military service, should be judged by the same standard." App. 24a.

er's application is clearly warranted by the sparse record of the Air Force disposition of it[11] taken together with the unqualified contentions of respondents that such is the settled state of the law.[12]

A. The Secretary's view is widely held, particularly among officials presently administering statutory or regulatory provisions for conscientious objectors.[13] But this view not only reflects a more strained reading of the statutory language; it contradicts the weight of decisional authority as well. We believe that the misreading of a single judicial decision explains this unusual variance between law and administrative viewpoint, but the law has nevertheless developed in an opposite direction from the administrators' error.

The statutory language, exempting one who

> "by reason of religious training and belief is conscientiously opposed to participation in war in any form,"

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[11] "It has been determined that you have not established that you are a conscientious objector within the meaning of AFR 35-24." Letter of January 31, 1967 to petitioner by Colonel John E. Horne, Deputy Chief of Staff, Personnel, USAF Academy. Exhibit G to the Complaint in this action (R. 64). See also the statement of Chaplain Major Dean C. Hofstad, USAF, entered in the proceedings on petitioner's application under date of December 29, 1966, as required by AFR 35-24, appearing as Exhibit K to the complaint (R. 76).

[12] See, for instance, Paragraph 2 of the Solicitor General's Memorandum in Opposition to Application for Stay Pending Certiorari filed herein June 1, 1967.

[13] See, for instance, Hershey et al., *Legal Aspects of Selective Service*, U. S. Government Printing Office (1963 Revision), p. 11. This publication is distributed by the Selective Service System "for the use of Government Appeals Agents of the Selective Service local boards and for the convenience of United States attorneys."

has remained unchanged since its adoption by Congress in the Selective Training and Service Act of 1940.[14] In it the words, "in any form," more naturally modify "participation" than "war," as was observed in *Taffs v. United States*, 208 F. 2d 329 (8th Cir. 1953), cert. den. 347 U. S. 928 (1954).[15] The administrators, themselves, moreover, when they drafted the Selective Service Regulations, so read this language, for they found that they could describe only the registrant to be classified as "I-O" (a conscientious objector to *all* military service) in the statutory language.[16] That language is significantly omitted from their parallel description of a registrant to be classified "I-A-O" (a conscientious objector available for noncombatant military

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[14] 54 Stat. 885.

[15] "The words 'in any form' obviously relate, not to 'war,' but to 'participation in' war. War, generally speaking has only one form, a clash of opposing forces. But a person's participation therein may be in a variety of forms." 208 F. 2d at 331.

[16] The pertinent regulations provide:

"*1622.11. Class I-A-O: Conscientious Objector Available for Non-combatant Military Service Only.*—(a) In Class I-A-O shall be placed every registrant who would have been classified in Class I-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to combatant training and service in the armed forces." 32 CFR §1622.11.

"*1622.14. Class I-O. Conscientious Objector Available for Civilian Work Contributing to the Maintenance of the National Health, Safety, or Interest.*—(a) In Class I-O shall be placed every registrant who would have been classified in Class I-A but for the fact that he has been found, by reason of religious training and belief, *to be conscientiously opposed to participation in war in any form* and to be conscientiously opposed to participation in both combatant and non-combatant training and service in the armed forces." 32 C. F. R. 1622.14. (Emphasis supplied.)

service), for the Selective Service System could not describe such a registrant as one "conscientiously opposed to participation in war in any form," however universal his opposition to all wars. The I-A-O only objects to a certain *form* of participation.

Finally, the word "form" bears almost no relationship to the Secretary's distinction between universal pacifists and discriminating ones. The difference between those wars to which some pacifists will not object and others to which they will arises not merely from the "form" of such wars, but from their total character—including their causes, their objects, their geography, and the nations which are parties to them. A congressional intent to make the Secretary's distinction would have been embodied in more apt language than " . . . opposed to participation in war in any form." [17]

The one, misread case which seems to be at the bottom of what, we submit, is the Secretary's error, is *United States* v. *Kauten*, 133 F. 2d 703 (2d Cir. 1943). Judge Augustus N. Hand's dictum therein, that an exemptable conscientious objection

> "must ex vi termini be a general scruple against 'participation in war in any form' and not merely an objection to participation in this particular war[,]" 133 F. 2d at 707,

is the sole authority cited by General Hershey and his legal advisors, in the guide they distribute to lawyers involved

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[17] Such as, for instance, " . . . opposed to participation in all wars."

in administering the UMTSA,[18] for the interpretation which the Secretary is applying. But the significant fact about *Kauten* is that the defendant there was, insofar as appears from the opinion and the Report of the Hearing Officer which is set forth in the margin, an objector to *all* wars.[19] The defect which the Hearing Officer found in Kauten's application for exemption was that his objections were not religious, and in this conclusion Judge Hand concurred.[20] The significance of the dictum about objections to a particular war is manifested in the following paragraph:

> "There is a distinction between a course of reasoning resulting in a conviction that a particular war is inexpedient or disastrous and a conscientious objection to participation in any war under any circumstances. . . . The former is usually a political objection, while the latter, we think, may justly be regarded as a response to an inward mentor, call it conscience or God, that is for many persons at the present time the equivalent

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[18] Hershey, et al., op. cit. *supra*, note 13, p. 11, fn. 32. See also Anno., "who is entitled to exemption as a conscientious objector within §6(j) of the Universal Military Training and Service Act—Federal cases," 99 L. ed. 443, 444 (1955).

[19] "Thus it appears that the Registrant believes in Gandhi's policy of passive resistance. . . . I conclude . . . that although he may be sincere in his opposition to war, his belief does not emanate from any 'religious training and belief' . . ." Report of the Hearing Officer, 133 F. 2d at 707, fn. 2.

[20] Actually the holding in *Kauten* was procedural: that the defendant was not entitled to show error of law in his Selective Service classification as a defense to his indictment for refusal to report for induction. All of the matter referred to in text, above, follows Judge Hand's observation that, "It seems proper, however, to say that we find no error of law on the part of the Appeal Board." 133 F. 2d at 707.

of what has always been thought a religious impulse." 133 F. 2d at 708.

It is thus not the statement of a separate requirement for the exemption but rather an observation—doubtful in the light of the evidence available today[21]—that the objections of a person opposed to a particular war will "usually" be merely political and not religious.

In support of the Secretary's view petitioner's counsel have been able to find but one case (other than the *Kauten* dictum): *United States* v. *Kurki*, 255 F. Supp. 161 (E. D. Wisc. 1966). Its holding, like *Kauten*'s, was a procedural one, and its observations on the eligibility for exemption of discriminating pacifists are weakened by the fact that this issue was hurriedly submitted for the first time after the defendant had discharged one lawyer and with the assistance of another changed the whole theory of his defense. Against this sparse authority, stands the host of decisions applying the exemption to the varying positions of members of the Jehovah's Witnesses denomination.[22] All of them reject respondents' view, on occasion quite explicitly.[23]

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[21] See, for instance, the summary of theological testimony in the Statement of the Case, *supra*, p. 8.

[22] Among them are *Sicurella* v. *United States*, 348 U. S. 385 (1955), decided in the face of the observation in dissent that the petitioner "reserves the right to choose the war in which he will fight," 348 U. S. at 395; *Kretchet* v. *United States*, 284 F. 2d 561 (9th Cir., 1960), where again a dissenting opinion forcefully brought home the kinds of non-spiritual warfare—defense of the Witness' brothers, of his home against invasion—in which Kretchet was willing to engage; *Bouziden* v. *United States*, 251 F. 2d 728 (10th Cir. 1958); *Mayfield* v. *United States*, 220 F. 2d 729 (5th Cir. 1955); *Pekarski* v. *United States*, 207 F. 2d 930 (2d Cir. 1953).

[23] E.g., *Shepherd* v. *United States*, 217 F. 2d 942 (9th Cir. 1954) (Justice Department's negative recommendation, asserting uni-

The Witnesses' cases may not be dismissed simply as having carved out an exception for those willing to fight in some unreal, "theocratic war." Not only do their facts often involve explicit acknowledgement of quite real and worldly circumstances in which the individual Witness will fight,[24] but the nature of the expected "theocratic war" itself, as defined in the registrant's statements, is often far from other-worldly.[25]

It is not necessary to contend that Congress, in first adopting the language of the present Section 6(j), expressing the national policy which AFR 35-24 undertakes to follow, specifically intended to exempt discriminating scruples of the kind Captain Noyd expresses. It is, indeed, quite unlikely that Congress gave any attention at all to the distinction which administrators have subsequently sought to engraft as an additional criterion onto the exemption. But this administrative distinction has been rejected by the great weight of judicial authority which comports better with the plain meaning of the statutory words. And this body of decisional law, albeit applied heretofore to members of but one denomination (to which Captain Noyd does not belong), better expresses the most

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versal pacifist requirement, said to have led appeal board to proceed "upon an erroneous theory as to what constitutes opposition to 'participation in war in any form'. . . ." 217 F. 2d at 946.)

[24] See, e.g., *Kretchet* v. *United States, supra,* note 22.

[25] In *Shepherd* (*supra,* note 23), the applicant stated that, "he is not a pacifist and that he will fight whenever *he* considers God commands him to do so." 217 F. 2d 942. (Emphasis supplied.) Compare the following from Pfeffer, *The Liberties of an American,* 1956, at p. 31: "Exact statistics are not available, but it is a reasonable probability that in the course of human history more blood has been shed in the name of God and the gods than for any other cause."

fundamental of the legislative purposes encompassed in the statute: that it is religiously informed conscience itself, *in the matter of war and killing,* rather than some conscientious scruples of a particular formulation or content, which national policy undertakes to respect.

B. The construction which petitioner urges is essential in order to save the statute, and the regulation, from constitutional defects—to avoid "imputing to Congress an intent to classify different religious beliefs, exempting some and excluding others. . . ." *United States* v. *Seeger,* 380 U. S. 163, 176 (1965).[26] An unwarranted discrimination based on the content of different religious beliefs—between those opposing all wars and those opposing only such as are deemed unjust—would violate both the First Amendment, *Sherbert* v. *Verner,* 374 U. S. 398 (1963), *Torcaso* v. *Watkins,* 367 U. S. 488, 495 (1961), and the due process mandate of the Fifth, *Bolling* v. *Sharpe,* 347 U. S. 497 (1954). The objectives of a national policy recognizing religiously informed scruples against war cannot be defined so as to warrant such a discrimination. Individual conscience is violated with as great injury, and the armed services are as poorly served, in either case.

As stated by Mr. Chief Justice Hughes in his dissenting opinion in *United States* v. *Macintosh,* 283 U. S. 605, at 635 (1935):

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[26] Judge Doyle, in his opinion granting preliminary injunctive relief, construed *Seeger* and *Sicurella, supra,* note 22, as not excluding petitioners: ". . . there are no particular limitations upon holding these conscientious views in terms of the kind of regimentation or the philosophy that moves one to adopt such views." App. 2a.

"Nor is there ground, in my opinion, for the exclusion of Professor Macintosh because his conscientious scruples have particular reference to wars believed to be unjust. There is nothing new in such an attitude. Among the most eminent statesmen here and abroad have been those who condemned the action of their country in entering into wars they thought to be unjustified. Agreements for the renunciation of war presuppose a preponderant public sentiment against wars of aggression. If, while recognizing the power of Congress, the mere holding of religious conscientious scruples against all wars should not disqualify a citizen from holding office in this country, or an applicant otherwise qualified from being admitted to citizenship, there would seem to be no reason why a reservation of religious or conscientious objection to participation in wars believed to be unjust should constitute such a disqualification."

III.

Certiorari should likewise be granted to determine the extent to which the guarantees of procedural due process under the Fifth Amendment apply to military administrative proceedings.

The Court of Appeals held that:

"great and wide discretion exists in the executive department both in the formation and application of regulations and in their interpretations in such matters as what constitutes 'for the good of the service,'"

and that the military need not meet the "classical" requirements of due process, 378 F. 2d at 540, App. 21a. On

this basis the Court of Appeals upheld Air Force regulations which provide only for the right to present written evidence in support of claims for conscientious objector status. Thus, the basic and essential rights to counsel, to be heard orally, to rebut evidence through confrontation of adverse witnesses, and to a reasoned opinion based upon known evidence are not, according to the Tenth Circuit, required by "military due process."

This ruling is in direct conflict with the clear trend of judicial opinion[27] and runs counter to the core principle of the Fifth Amendment that no person may be deprived of life, liberty or property without an opportunity to be heard. See, e.g., *Londoner* v. *Denver*, 210 U. S. 373 (1908); *Greene* v. *McElroy*, 360 U. S. 474, 496-97 (1959).

This most basic right applies to civil and criminal proceedings, *Coe* v. *Armour Fertilizer Works*, 237 U. S. 413 (1915), as well as to administrative proceedings, *Londoner* v. *Denver*, *supra*; *Joint Anti-Fascist Committee* v. *McGrath*, 341 U. S. 123, 167 (1951) (concurring opinion); *Morgan* v. *United States*, 304 U. S. 1, 19 (1938). Military proceedings whether criminal, civil or administrative have been held to be subject to essentially identical Fifth Amendment due process guarantees, and the courts have refused to defer to congressional acts or military regulations establishing procedures devoid of even the minimal protections of due process.[28] See *Clackum* v. *United States*, 296

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[27] But see *Brown* v. *McNamara*, *supra* at 20 (appeal to Third Circuit pending), where the District Judge made the extravagant statement that the Secretary of Defense could, "without violating any constitutional rights, *totally deny*" any procedure for dealing with in-service conscientious objector claims. (Emphasis added.)

[28] The Constitution applies due process limits on all governmental power, "even the war power". *Galvan* v. *Press*, 347 U. S.

F. 2d 226, 228 (Ct. Cl. 1960); *Bland* v. *Connally*, 293 F. 2d 852 (D. C. Cir. 1961); *Application of Stapely*, 246 F. Supp. 316 (D. Utah 1965); *Shapiro* v. *United States*, 69 F. Supp. 205 (Ct. Cl. 1947); cf. *Williams* v. *Zuckert*, 372 U. S. 765 (1963), *Harmon* v. *Brucker, supra; Beard* v. *Stahr*, 370 U. S. 41 (1962); *Reed* v. *Franke, supra.*[29]

The Chief Justice has commented that the argument for the inapplicability of the Bill of Rights to military affairs requires

> a most extraordinary showing of military necessity in defense of the Nation. Warren, "The Bill of Rights and the Military," 37 N. Y. U. L. Rev. 181, 197 (1962).

No such "narrow" and "rare" necessities or circumstances, *Joint Anti-Fascist Refugee Committee* v. *McGrath, supra* at 168, are present here. There is no threat to the national security. Compare *Ludecke* v. *Watkins*, 335 U. S. 160 (1948) with *United States ex rel. Knauff* v. *Shaughnessy*, 338 U. S. 537 (1950). Nor is there a question of military confidentiality. Cf. *Greene* v. *McElroy, supra.* No valid countervailing interests have been asserted by the Govern-

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522, 530 (1954). See *Overseas Media Corporation* v. *McNamara*, #20,590 (D. C. 1967) (opinion rendered October 3, 1967, holding that action of Secretary of Defense in refusing access by magazine publisher to privileged distribution system is subject to due process limits, and reversing District Court's grant of summary judgment).

[29] The United States Court of Military Appeals is in agreement. See *United States* v. *Jacoby*, 11 U. S. C. M. A. 428, 430-431, 29 C. M. R. 244 (1960): ". . . it is apparent that the protections of the Bill of Rights except those which are expressly or by necessary implication inapplicable, are available to members of our armed forces" [citing *Burns* v. *Wilson, supra*]. And see Quinn [Chief Judge of the Court of Military Appeals], "The United States Court of Military Appeals and Military Due Process," 35 St. John's L. Rev. 225, 232 (1961).

ment or the courts below to justify these inherently unfair and prejudicial procedures. The discipline of the Air Force will not be disrupted, nor its morale impaired or its orderly functioning upset to any significant degree by the imposition of minimum constitutional safeguards.

Most important perhaps is the fact that the nature of the conscientious objector claim itself compels a hearing. The various *subjective* factors which AFR 35-24 submits to official consideration[30] in determining the validity of the claim logically require that an opportunity be accorded both sides to meet opposing arguments.

These procedural deficiencies raise serious equal protection questions, as regards the comparative rights of in-service personnel and Selective Service System registrants to procedural due process in the determination of their respective conscientious objector claims. The procedure established by the UMTSA, §6(j), 50 U. S. C. App. 456(j), provides applicants with a number of valuable procedural rights (see Complaint pp. 17-18, R. 17-18). These have been construed liberally by the federal courts. See *Simmons* v. *United States*, 348 U. S. 397 (1955); *Gonzales* v. *United States*, 348 U. S. 407 (1955); *Brewer* v. *United States*, 211 F. 2d 864 (4th Cir. 1954); *Arndt* v. *United States*, 222 F. 2d 484 (5th Cir. 1955). Cf. *United States* v. *Gearey*, *supra* at 148.

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[30] AFR 35-24, Section A, Paragraph 3c provides that the following factors be considered:

"(a) Membership in a peace church.
(b) Training in home and church.
(c) General demeanor and pattern of conduct.
(d) Employment in defense-connected activities.
(e) Participation in religious activities.
(f) Credibility (and that of persons supporting his claim)." App. 24a.

Congress has recognized the necessity of full procedural guarantees for an equitable resolution of contested conscientious objector claims. Air Force regulations must be designed so as to fully effectuate this right. Logic and well-established constitutional principles mandate some type of fair hearing as the only adequate means of ensuring a fair determination on the merits.

The Court of Appeals erroneously misconstrued petitioner's argument as insisting on "the classical requirements of due process," and then did not indicate what kind of due process, if any, petitioner was entitled to. It is clear that petitioner did not receive any kind of meaningful due process, classical or otherwise. A grant of certiorari is therefore of the greatest public importance, in order to set forth the constitutional metes and bounds of due process for in-service conscientious objector claims.

IV.

AFR 35-24 provides in part, in Section B, paragraph 6a:

> "An officer or an airman who professes to be a conscientious objector may submit a resignation or application for separation to his immediate commander. The commander will forward the case in accordance with the regulation under which submitted, to Hq USAF (AF PMPKA) for final determination. Each forwarding indorsement will include a recommendation of approval or disapproval of the request, with a statement of the *reasons therefor*" (emphasis supplied). App. 25a.

When petitioner submitted his application under AFR 35-24, the respondent General Moorman, the Superinten-

dent of the Academy, was his immediate commander. General Moorman forwarded the case with a recommendation of disapproval as follows:

> "I recommend disapproval of his request for release from active duty based on his unfulfilled service commitment. It appears that his application for resignation does not meet the requirements of AFR 35-24 and is forwarded to Hq USAF for final determination." (Letter of 31 December 1966, admitted below as Government's Exhibit 4.) R. 289.

General Moorman was under an obligation at this point to determine the validity of appellant's application and include within his decision the reasons therefor. General Moorman's recommendation of disapproval entirely failed to satisfy this requirement.

General Moorman's statement that appellant did not meet the requirements of the regulation merely restated his conclusion that the request should be disapproved. It was not a "basis of cause", "justification", "explanation", "support", "ground", "motive", or "proof" for such disapproval.[31] Consequently, it could not be a "reason" for the disapproval.

If such a statement were considered a "reason" under AFR 35-24 for the recommendation of disapproval, the requirement of "reasons" would serve no useful purpose. At the very least, the requirement of "reasons" is designed to aid in making the final decision by revealing the basis for

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[31] See definitions of "reason" in any standard dictionary. See also *Barry* v. *O'Connell*, 303 N. Y. 46, 100 NE 2d 127, 129 (1951); *Brackett* v. *Board of Appeal of Building Department*, 311 Mass. 52, 39 NE 2d 956, 958 (1942).

the opinion of the officer most directly in contact with the applicant for separation. The requirement of "reasons" serves to check arbitrary recommendations by the immediate commanding officer and to make him consider more carefully what action should be taken. It also aids USAF Headquarters in evaluating the recommendation of the immediate commanding officer. This protection is much less than would be afforded by a hearing and accompanying due process guarantees. But where few procedural rights are given, it is particularly important to maintain the ones which do exist.

Since the recommendation of General Moorman did not contain the "reason therefor", the Air Force violated its own regulations in the process of deciding appellant's application. These regulations are binding on the Air Force, and a decision rendered in violation of them is invalid.[32] See *Vitarelli* v. *Seaton*, 359 U. S. 535, 540 (1959) ("... the Secretary here ... was bound by the regulations which he himself had promulgated for dealing with such cases...."); *Service* v. *Dulles*, 354 U. S. 363 (1957); *U. S. ex rel. Accardi* v. *Shaughnessy*, 349 U. S. 286 (1954). Administrative regulations of a military department are no less binding than any other administrative regulations. *Ingalls* v. *Zuckert*, 309 F. 2d 659 (D. C. Cir. 1962); *Smith* v. *United States*, 155 Ct. Cl. 682 (1961).

The Court of Appeals erred by holding that one must strain to find even an "overtone of constitutional inva-

[32] See *United States* v. *Mason*, #4207, U. S. D. C., D. Mont. decided on September 15, 1967. In a judgment of acquittal, the Court held that similar failure to supply reasons in processing an in-service conscientious objector application rendered the rejection of such application a nullity.

lidity", 378 F. 2d at 540, App. 21a in this plain deprivation of a substantial procedural right granted by regulation. Certiorari should be granted to dispel the confusion bound to be created by a decision which suggests that in some instances the military need not obey their own regulations, but does not set forth any standards or guidelines.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: October 13, 1967

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* Petitioner's attorneys gratefully acknowledge the research assistance of Mr. David Rudovsky, graduate student at University of Pennsylvania Law School, and Mr. Roger Dunwell, second-year student at New York University School of Law, and express their appreciation to the Law Students Civil Rights Research Council.

APPENDIX

Opinion of the District Court, District of Colorado, Dated March 29, 1967

WILLIAM E. DOYLE, *U.S.D.J.*:

This is an action in which the plaintiff, in a lengthy complaint in which he names the Secretary of Defense, Secretary of the Air Force, Chief of Staff of the Air Force, Superintendent of the Air Force Academy and other officials, seeks declaratory relief and applies for habeas corpus, seeks injunctive relief and, at the moment seeks a preliminary injunction.

The factual basis for this is that plaintiff has declared himself to be a conscientious objector and, notwithstanding that fact, the Air Force proposes to transfer him to Cannon Air Force Base, New Mexico, as of April 1, 1967. The allegation is that this is a training base, or, jumping-off base for Vietnam, and that he will be compelled, contrary to his beliefs, to at least train fliers who are going to Vietnam, and he says that this is work that is contrary to his conscientious scruples.

APPENDIX

It is to be gleaned from reading the complaint and from statements of counsel that plaintiff is not a member of any religious group, but rather that he holds a philosophy which he declares as "ethical humanism" which dictates these scruples against war. It is also to be gleaned that he does not object to all war; that he objects rather to particular wars of aggression, but specifically to the Vietnam War and that he would not be a conscientious objector if it were a matter of defending the United States. He doesn't rule out the possibility that he would go to foreign countries first in order to carry out an assignment of defending the United States.

From this it is maintained by the defendants that he is not entitled to be classified as a conscientious objector and

lidity", 373 F. 2d at 540, App. 21a in this plain deprivation of a substantial procedural right granted by regulation. Certiorari should be granted to dispel the confusion hereby said to be created by a decision which suggests that in some instances the military need not obey their own regulations, but does not set forth any standards or guidelines.

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It is to be gleaned from reading the complaint and from statements of counsel that plaintiff is not a member of any religious group, but rather that he holds a philosophy which he declares as "ethical humanism" which dictates these scruples against war. It is also to be gleaned that he does not object to all war; that he objects rather to particular wars of aggression, but specifically to the Vietnam War and that he would not be a conscientious objector if it were a matter of defending the United States. He doesn't rule out the possibility that he would go to foreign countries first in order to carry out an assignment of defending the United States.

From this it is maintained by the defendants that he is not entitled to be classified as a conscientious objector and

that it is clear from the record as applied to the statute involved, 50 U. S. C. §456(j), that he is not opposed to war in any form. A definition contained in the statute is called to the Court's attention, and although it is set up in a somewhat left-handed way, it suggests this interpretation. However, an examination of the cases does not bear this out because the Supreme Court has given a broad interpretation to the term, particularly the Seeger case which was cited to me, *United States* v. *Seeger,* 380 U. S. 163, 88 S. Ct. 850 (1965). Although it doesn't deal specifically with whether one can be a conscientious objector in a limited way, it does indicate that there are no particular limitations upon holding these conscientious views in terms of the kind of regimentation or the philosophy that moves one to adopt such views. Moreover, a similar judicial viewpoint, attitude, or approach is made in *Sicurella* v. *United States,* 348 U. S. 404, 75 S. Ct. 403 (1965), so that I must conclude from reading these cases that the complaint is not entirely without substance and that it does demand that the case be given further study.

It has also been strongly urged by the defendants that we do not have jurisdiction to hear and determine the matter. Yet, an almost identical motion was considered by the Court of Appeals for the District of Columbia in the case of *Gallagher* v. *Quinn,* 363 F. 2d 301, in an opinion by Judge Fahy, which specifically recognizes that there is jurisdiction over the subject matter in a factual context similar to this one. So I do feel that it is a case in which a full hearing should be had, either now or later. Indeed, it is going to have to be had, and if this Court were to dismiss this complaint upon the basis of the brief hearing that was had here today, I think that it almost certainly would be referred back for a hearing in depth on its merits.

So, without determining definitely that the cause is one that is meritorious, without intending to establish any precedent for this type of case, it is this Court's conclusion that there is enough merit expressed and there is probable jurisdiction shown justifying the granting of some kind of relief, with a view to taking a closer look at it in an unhurried atmosphere and after both sides have had an opportunity to prepare themselves.

I note that this case was filed on Monday. I have had no opportunity to read the complaint. We heard it this morning. I have been tied up all afternoon and have not had an opportunity to study it. The views expressed are not studied, but they are viewpoints I have arrived at from hearing counsel and from the limited amount of study I have given it. I do feel that this requires a full hearing and this is why I have determined that a preliminary injunction should issue against assigning the plaintiff to combat activity or requiring him to perform duties whereby he will be perhaps faced with the necessity of a General Court Martial or other proceedings that might injure him as a practical matter. I do not wish to interfere with the power of the Air Force to move him from one place to another; in other words, I do not wish to exercise any more power than is necessary under the circumstances and, accordingly, the injunction, or restraining order which is entered is against requiring the plaintiff, until the further order of the Court and until a hearing on the merits can be had, to perform combat-type activity, directly or indirectly. The Court does hold that it retains jurisdiction of the controversy and it is suggested that we try the case on the merits in about three weeks from today, Wednesday, April 19, commencing at 9:30 o'clock a.m.

I would ask counsel to prepare an order consistent with the statements made here.

Opinion of the District Court for the District of Colorado, Dated April 25, 1967

WILLIAM E. DOYLE, *U.S.D.J.*:

Action by Air Force officer seeking declaratory relief, injunction and writs of habeas corpus and mandamus because of refusal of defendants to recognize officer's asserted status as conscientious objector and to assign him accordingly, or in alternative, to accept his resignation. The District Court William E. Doyle, J., held that where Air Force officer had twice made applications for separation or for assignment recognizing his conscientious objector views, and both applications had been refused, officer would be required to exhaust remedies within military establishment and court was without jurisdiction to hear officer's claim in action designed to spare officer from military justice.

Order accordingly.

Marvin M. Karpatkin, New York City, William F. Reynard, Denver, Colo., for plaintiff, Ernest Angell, John de J. Pemberton, Jr., Melvin L. Wulf, Eleanor H. Norton and Rhoda H. Karpatkin, New York City, of counsel.

Lawrence M. Henry, U. S. Atty., for Dist. of Colorado, Denver, Colo., Barefoot Sanders, Asst. Atty. Gen., Harland F. Leathers, Frederick W. Drogula and C. Westbrook Murphy, Attys., Dept. of Justice, Washington, D. C., for defendants.

MEMORANDUM OPINION AND ORDER

WILLIAM E. DOYLE, District Judge.

Plaintiff, a regular commissioned officer in the United States Air Force, seeks declaratory relief, an injunction

and writs of habeas corpus and mandamus. The demands for relief stem from the refusal of the defendants to recognize plaintiff's asserted status as a conscientious objector and to assign him accordingly or, in the alternative, to accept his resignation from the Air Force.

Plaintiff Noyd is an Air Force captain and has been a regular commissioned officer for over eleven years. He received his commission in 1955 following graduation with distinction from Washington State University as a member of the Air Force Reserve Officers' Training Corps. Upon entry on active duty he applied for and received eighteen months of flying training. From May, 1957 to May, 1960, he was assigned to a combat unit in England as a tactical fighter pilot. In 1958, plaintiff applied under the Air Force education program to enter graduate school in the field of psychology. His application was approved and he attended the University of Michigan for three years from June, 1960 to June, 1963, receiving a master's degree and completing one year of work toward the doctoral degree. During this period plaintiff was regularly promoted and received full pay and allowances. He in addition had his tuition and other college expenses paid. As a result of this educational program, plaintiff incurred a continuing service obligation of six years. This obligation expires in June of 1969.

During the summer of 1963, plaintiff was transferred to the United States Air Force Academy where he was assigned as an Assistant Professor in Psychology. It appears that on December 8, 1966, while thus assigned, plaintiff submitted a letter of resignation to the Academy Superintendent under the provisions of paragraph 16m, Air Force Regulation 36-12,[1] for the "best interest" of the

[1]Air Force Regulation 36-12, "Administrative Separation of Commissioned Officers and Warrant Officers of the Air Force,"

service. In this letter plaintiff stated that he was "opposed to the war that this country is waging in Vietnam * * *" The reasons given were essentially political in nature; however, the plaintiff did make reference to his belief in "ethical humanism."[2] In the same letter, plaintiff also stated that he was "not a pacifist," acknowledging a belief in the necessity to employ force to deter or repel "totalitarian aggression."

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dated August 1, 1963, provides as follows under paragraph 16, *Resignation Resulting in Honorable Discharge*:

> "M. *Other Miscellaneous Reasons.* Within the time limitations specified in paragraph 14 above, officers who are not eligible to tender their resignations under any criteria contained in a through l above, may tender their resignations under this paragraph, if they can establish that their separation from the service will be in the best interest of the Air Force. Each resignation tendered under this paragraph will be considered on the individual merits of the case and normally will not be approved unless it is established that separation of the officer will be in the best interest of the Air Force. (SDN 610)"

[2] "It would appear that I am no longer a loyal Air Force officer if this loyalty requires unquestioning obedience to the policies of this nation in Vietnam. I cannot honestly wear the uniform of this country and support unjust and puerile military involvement. Although it may be inconsistent, I have been able to justify (or rationalize) my position here at the Academy by my belief that my contribution in the classroom has had more effect in encouraging rationalism, a sense of humanism, and the development of social consciousness than it has had in the inculcation of militarism. My system of ethics is humanistic—simply a respect and love for man and confidence in his capability to improve his condition. This is my ultimate loyalty. And, as a man trying to be free, my first obligation is to my own integrity and conscience, and this is of course not mitigated by my government's permission or command to engage in immoral acts. I am many things before I am a citizen of this country or an Air Force officer; and included among these things is simply that I am a man with a set of human values which I will not abrogate. I must stand on what I am and what I believe. The war in Vietnam is unjust and immoral, and if ordered to do so, I shall refuse to fight in that war. I should prefer, and request, that this resignation be accepted."

Plaintiff's letter was submitted through channels to the Secretary of the Air Force, who denied the request on December 29, 1966. Meanwhile, on December 16, 1966, plaintiff addressed a second letter requesting that any reassignment be to duties providing minimum conflict with his professed beliefs. He had by this time learned that he was to be transferred to Cannon Air Force Base, New Mexico, purportedly for assignment to the Twenty-seventh Tactical Fighter Wing. The allegation is that this is a training base, or jumping-off base for Vietnam, where plaintiff would either be prepared for personal assignment to the combat zone, or would train others for such duty.

On December 28, 1966, plaintiff submitted a third letter alternatively requesting separation as a conscientious objector under the provisions of Air Force Regulation 35–24. This regulation provides for the recognition of a bona fide claim of conscientious objection by a member of the Air Force "to the extent practicable and equitable."[3] This

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[3] The stated purpose of Air Force Regulation 35–24, dated March 8, 1963, is to establish "uniform procedures for the utilization, assignment, and consideration of requests for separation of conscientious objectors." It implements Department of Defense Directive 1300.6, "Utilization of Conscientious Objectors and Procedures for Processing Requests for Discharge Based on Conscientious Objection," dated August 21, 1962. Paragraph 2 of the Regulation provides:

2. Air Force Policy:

"a. *Appointment or Enlistment of Conscientious Objectors.* The Air Force does not accept individuals (other than physicians or dentists) who claim conscientious objection to military service for appointment as officers or for enlistment in the active force or the Reserve forces. Cases may arise, however, in which individual members profess a conscientious objection after entering military service.

"b. *Recognition of Conscientious Objection.* The fact of conscientious objection does not exempt men from the draft. However,

letter was submitted as an addendum to plaintiff's original request, and it repeated the ground for separation therein set forth. It also contained an explanation of his humanist beliefs which were defined by him as "respect and love for man, faith in his inherent goodness and perfectability, and confidence in his capability to ameliorate some of the banes of the human condition." Noyd was specific in asserting that he does not believe in the traditional Christian

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the Congress has deemed it more essential to respect an individual's religious beliefs than to force him to serve in the Armed Forces. Accordingly, bona fide religious objection to participation in war, in any form, has been recognized to the extent that such an objector is not inducted into the Armed Forces but is required to serve his country for the same period of time in civilian work contributing to the maintenance of national health, safety, or interest. Consistent with this national policy, bona fide conscientious objection by a member of the Air Force will be recognized to the extent practicable and equitable.

"c. *Claim to Exception From Military Service.* Federal courts have held that a claim to exemption from military service under the Universal Military Training and Service Act must be interposed prior to notice of induction. Failure to make timely claim for exemption constitutes a waiver of the right to claim. Therefore, the Air Force cannot entertain a request for separation based solely on conscientious objection:

"(1) Which existed but was not claimed before entry on active duty or enlistment.

"(2) Which was claimed, and denied by Selective Service, before entry into military service.

"d. *Separation.* No vested right exists for any individual to be separated from military service at his own request before the expiration of his term of service, whether he is serving voluntarily or involuntarily. Administrative separation before completion of the term of service is discretionary with the Secretary of the Air Force, on the basis of judgment of the facts and circumstances in the case. The Air Force normally will separate members for whom a classification as conscientious objector is recommended (see paragraph 3b), except that a member for whom a 1-A-O classification is recommended will not be separated until he has completed two years of active service (see paragraph 8a(2))."

concept of a personal or anthropomorphic God,[4] and does not claim membership in a particular religious organization.[5] He reiterated that he is not a "total pacifist."[6] Accompanying the letter was a statement from plaintiff's Base chaplain testifying to his sincerity and recommending that he be utilized in areas other than Vietnam. However, the chaplain stated that he could not classify plaintiff as a conscientious objector.

On January 24, 1967, the Secretary of the Air Force again refused plaintiff's tender of resignation. Subsequently, plaintiff received orders assigning him to the Twenty-seventh Tactical Fighter Wing, Cannon Air Force

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[4] "The 'God' in which I believe transcends the traditional Christian God and yet does not transcend human experience and faith built upon that experience; it is an ultimate concern for man, his purpose, and his possibilities. Part of the essence of that in which I believe is captured by Tillich: '"God" is the answer to the question implied in man's finitude; he is the name for that which concerns man ultimately. This does not mean that first there is a being called God and then the demand that man should be ultimately concerned about him. It means that whatever concerns a man ultimately becomes God for him' * * *"

[5] Plaintiff's only professed "affiliation" is as a "spiritual ally of the American Humanist Association." This organization was incorporated as an educational membership organization in 1941 to represent the views of humanists in the United States and Canada. It is a founding member of the International Humanist Ethical Union, and publishes a bi-monthly journal entitled the "Humanist."

[6] "I am not a total pacifist; I believe that the use of force, or the threat of force, is sometimes necessary and just when used in self-defense, both for an individual and for a nation. I should support the use of force by a nation, or preferably the community of nations, in the defense of a nation whose integrity and existence is threatened by an external aggressor—and when all peaceful attempts at conflict resolution have proven futile. * * * I cannot prognosticate what future wars of this nation I could support. I know only that the war the United States is waging in Vietnam is unjust and immoral, that it does violence to my conscience and beliefs, and that it is impossible therefore for me to participate in, or contribute to, that war."

Base, New Mexico, for upgrading in the F–100 aircraft. This aircraft is currently being used in Vietnam, and the probability is strong that anyone receiving training at Cannon can anticipate transfer to the combat zone. At this point, plaintiff filed his complaint here on March 27, 1967, seeking the relief described above.

Plaintiff's threefold contentions may be summarized as follows: He first asserts that the denial of his application for recognition as a conscientious objector violates his rights under the Constitution and relevant statutes and regulations. *Secondly,* he attacks the constitutionality of AFR 35–24 as lacking the minimum criteria of procedural due process. His third allegation is that the Air Force failed to follow the provisions of AFR 35–24, in that the Air Force failed to give reasons for the disapproval of his application.

We heard arguments on March 29, 1967, and entered a preliminary order noting probable jurisdiction. We temporarily enjoined defendant from requiring plaintiff to perform any combat-type activity, directly or indirectly. We did not interfere with the transfer of plaintiff to Cannon Air Force Base, but limited the injunction to the type of duty to which plaintiff could be assigned. At the same time, we set the case down for a hearing on the merits on April 19, 1967.

On April 12, 1967, defendant filed alternative motions to dismiss and for summary judgment. The assertions of the motion to dismiss were that plaintiff has failed to exhaust his administrative remedies; that the Constitution vests exclusive authority to govern the duty assignments of military personnel in the President and in Congress; that this action is an unconsented suit against the United

States; and that the complaint fails to state a claim upon which relief can be granted. Among other things, the defendants stress that the Government has invested over $250,000.00 in giving plaintiff the training he has received; that there now exists a shortage of trained pilots in the combat zone in Vietnam; and that plaintiff voluntarily committed himself to service to June, 1969, when he accepted his educational training at the University of Michigan. These arguments are made in conjunction with the provision of AFR 35–24, which provides for the recognition of a bona fide claim of conscientious objection by a member of the Air Force only "to the extent practicable and equitable." See note 3, supra.

We proceeded with the previously scheduled hearing on April 19, 1967, notwithstanding the jurisdictional allegations made in defendants' motion to dismiss, reserving decision on the question of jurisdiction until plaintiff's responsive brief had been received. We also allowed plaintiff to submit evidence in further explanation of his beliefs and to call distinguished theologians and philosophers who testified in some depth to the spiritual and religious relationship between ethical humanism and organized religion.

The threshold question is whether this court has jurisdiction to entertain the suit and to grant the relief requested. On its face it is a collateral attack on an administrative decision which attack is made prior to the completion of proceedings in the department. It anticipates the refusal of the Air Force to recognize plaintiff's stand and seeks to avoid court martial proceedings and the imposition of sanctions. Thus, the initial question is whether plaintiff has exhausted the remedies which exist within the military establishment whereby this court can entertain the action.

As stated above, plaintiff has twice made applications for separation or for assignment which recognizes his conscientious objector views, and both applications have been refused. He maintains that this sufficiently demonstrates the futility of continued efforts within the Air Force. He asserts that to refuse to grant declaratory relief would unreasonably force him to violate military orders and would place him in jeopardy—that this is contrary to the theory and purpose of declaratory proceedings. The difficulty is that the cases do not support the plaintiff in this position. We are, of course, familiar with the exhaustion principle as applied to state court proceedings. It arises in the state prisoner cases among others. It is a species of abstention designed to limit federal intervention to cases which present clear cut federal questions and to give other tribunals full opportunity to first consider the questions. It has been applied consistently to military adjudications.

One of the early Supreme Court decisions which applied this principle was Wales v. Whitney, 114 U. S. 564, 5 S. Ct. 1050, 29 L. Ed. 277 (1885). There the plaintiff sought in a habeas corpus proceeding to challenge the validity of military orders. The Supreme Court upheld the lower court's decision denying relief. It ruled that the civil court lacked jurisdiction, but that he could raise the legality of the order in the military court.

In a relatively recent decision, Gusik v. Schilder, 340 U. S. 128, 71 S. Ct. 149, 95 L. Ed. 146 (1950), the Supreme Court again adhered to this approach in a case in which there had been conviction but the petitioner had not sought a new trial. The petitioner had been convicted of murder by court-martial and had exhausted all of his then existing remedies. The petitioner had not utilized a subsequently-adopted pro-

vision which allowed the Judge Advocate to grant a new trial in any court martial case. The District Court had issued the writ. In affirming the decision of the Court of Appeals reversing this judgment, the Supreme Court said:

> "If Article 53 had been in force when the habeas corpus proceedings were instituted, the District Court would not have been justified in entertaining the petition unless the remedy afforded by the Article had first been exhausted. An analogy is a petition for habeas corpus in the federal court challenging the jurisdiction of a state court. If the state procedure provides a remedy, which though available has not been exhausted, the federal courts will not interfere. This is not only the holding of the Court in a long line of cases [citing cases]; it is the rule which Congress recently wrote into the Judicial Code. 28 U. S. C. § 2254, 28 U. S. C. A. § 2254. The policy underlying that rule is as pertinent to the collateral attack of military judgments as it is to collateral attack of judgments rendered in state courts" 340 U. S. at 131, 132, 71 S. Ct. at 151.

The Court of Appeals for the Tenth Circuit has consistently adhered to this rule. It has been so in cases in which military court martial proceedings had been instituted. Gorko v. Commanding Officer, 10 Cir. 1963, 314 F. 2d 858; Spencer v. Hunter, 10 Cir. 1949, 177 F. 2d 370, cert. denied 344 U. S. 869, 73 S. Ct. 112, 97 L. Ed. 673; Simmons v. Hunter, 10 Cir. 1960, 179 F. 2d 664, cert. denied 339 U. S. 968, 70 S. Ct. 984, 94 L. Ed. 1376; McMahan v. Hunter, 10 Cir. 1950, 179 F. 2d 661, cert. denied 339 U. S. 968, 70 S. Ct. 985, 94 L. Ed. 1376; Reck v. Hunter, 10 Cir. 1950, 179 F. 2d 784; Dickens v. Hunter, 10 Cir. 1950, 179 F. 2d 784; Hunter

v. Beets, 10 Cir. 1950, 180 F. 2d 101, cert. denied 339 U. S. 963, 70 S. Ct. 997, 94 L. Ed. 1372; McKinney v. Finletter, 10 Cir. 1953, 205 F. 2d 761.

In Gorko v. Commanding Officer, supra, the United States Court of Military Appeals had reversed petitioner's murder conviction and the case had been set for a second court martial trial at the time the petitioner sought a writ of habeas corpus in said District Court. He alleged in the petition that he was being placed in double jeopardy as a result of the upcoming re-trial. The Court of Appeals, however, held that he had not exhausted his military remedies, saying:

> "Exhaustion of all available military remedies is required before reliance may be had on habeas corpus. The Uniform Code of Military Justice provides that no person, without his consent, may be tried a second time for the same offense. The adequacy and availability of the military remedy is not questioned. Consideration of the question by the courts is, accordingly, premature."

In the other cited cases petitions seeking habeas corpus by individuals incarcerated in federal prisons pursuant to court martial conviction were denied for failure to exhaust remedies afforded by Article 53 of the Articles of War, 10 U. S. C. § 1525, now 10 U. S. C. § 873.

There is good reason for the strict requirement of exhaustion as a prerequisite to jurisdiction. In part it is based on the separation of powers and particularly the desirability of allowing the military to govern its own affairs without interference from the courts. If courts were allowed to entertain these suits at any stage of the military proceedings, the delays incident to litigation could

of themselves render military orders ineffectual. These expressions are contained in the opinion of the Supreme Court in Orloff v. Willoughby, 345 U. S. 83, 73 S. Ct. 534, 97 L. Ed. 842, wherein the petitioner sought to enjoin his duty assignment. The Court said:

> "We know that from top to bottom of the Army the complaint is often made, and sometimes with justification, that there is discrimination, favoritism or other objectionable handling of men. But judges are not given the task of running the Army. The responsibility for setting up channels through which such grievances can be considered and fairly settled rests upon the Congress and upon the President of the United States and his subordinates. The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters. While the courts have found occasion to determine whether one has been lawfully inducted and is therefore within the jurisdiction of the Army and subject to its orders, we have found no case where this Court has assumed to revise duty orders as to one lawfully in the service.
>
> "• • • Discrimination is unavoidable in the Army. Some must be assigned to dangerous missions; others find soft spots. Courts are presumably under as great a duty to entertain the complaints of any of the thousands of soldiers as we are to entertain those of Orloff. The effect of entertaining a proceeding for judicial discharge from the Army is shown from this case. Orloff was ordered sent to the Far East Command, where the United States is now engaged in combat.

> By reason of these proceedings, he has remained in the United States and successfully avoided foreign service until his period of induction is almost past. Presumably, some doctor willing to tell whether he was a member of the Communist Party has been required to go to the Far East in his place. It is not difficult to see that the exercise of such jurisdiction as is here urged would be a disruptive force as to affairs peculiarly within the jurisdiction of the military authorities." 345 U. S. at 93, 95, 73 S. Ct. at 540.

Plaintiff maintains that the exhaustion of remedies principle expressed in the cases does not apply to the conscientious objector case; that such a petitioner need only follow out the remedies provided in the procedural regulation pertaining to conscientious objectors. The courts which have considered this specific question have, however, required exhaustion in this type of case as well as the court martial case. See Brown v. McNamara, D. C. N. J., 1967, 263 F. Supp. 686; Chavez v. Fergusson, N. D. Cal. 1967, 266 F. Supp. 879. See also Petition of Green, S. D. Calif., S. D. 1957, 156 F. Supp. 174. We can see no difference from the standpoint of exhaustion of remedy and abstention by Federal Courts between the conscientious objector case and the others which are processed in military courts. No good reason is apparent why the military should not have primary jurisdiction to hear and determine the question in the conscientious objector case as well as in the case in which the service man faces military justice proceedings.

Plaintiff refers us to the line of cases[1] which allow inductees to challenge a wrongful induction by way of habeas

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[1] E.g., Gibson v. United States, 329 U. S. 338, 67 S. Ct. 301, 91 L. Ed. 331 (1946); Billings v. Truesdell, 321 U. S. 542, 64 S. Ct. 737, 88 L. Ed. 917 (1944).

corpus, contending that there is no valid distinction between the conscientious objector who unsuccessfully asserts his claim during the induction proceedings and thereafter attempts to gain release through habeas corpus and the individual who seeks release following voluntary enlistment. The latter has subjected himself to the military establishment and it is not unreasonable to require him to exhaust his remedies within that establishment before coming to court. The person who challenges the validity of his induction has never submitted himself to the military tribunals. Plaintiff has been a part of the military for many years. He has enjoyed its benefits and it is not unreasonable to require him to face its burdens.

When we first considered this case we noted probable jurisdiction on the basis of Gallagher v. Quinn, 1966, 124 U. S. App. D. C. 172, 363 F. 2d 301, cert. denied 385 U. S. 881, 87 S. Ct. 167, 17 L. Ed. 2d 108. We now conclude that it is not authority in the present context. In that mandamus suit which sought to compel the Court of Military Appeals to review his conviction of robbery, there was not the exhaustion problem which asserts itself here. A constitutional question[8] was there raised which could not be taken to the Supreme Court, and hence if the United States District Court for the District of Columbia had not taken jurisdiction the constitutional question could not have been considered by the courts. This possibility does not exist here. The contrast between *Gallagher* and the case at bar is thus clear.

We conclude that we are without jurisdiction to hear the plaintiff's claim. It is a collateral attack regardless of

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[8] Specifically, he asserted that the review provisions of the Uniform Code of Military Justice (10 U. S. C. §867(b)) denied him equal protection of the laws contrary to the due process clause of the Fifth Amendment.

whether it is considered in the framework of habeas corpus, injunction, or declaratory judgment, and the result is always the same. We must restrain ourselves from interfering with the military processes. Plaintiff would have us short-circuit all of these proceedings so as to spare him from military justice. This we can not do. He has been a part of the military establishment for twelve years, and he can not now gain his freedom by a short cut court action. We do not reach the merits of plaintiff's case and hence we do not deny his sincerity or reject his particular basis for claiming that he is a conscientious objector.

It is concluded that the relief prayed for must be denied. It is

Ordered that the restraining order be dissolved and that the complaint be dismissed. Counsel for the Government will submit an appropriate order for the signature of the Court.

Opinion of the Court of Appeals for the Tenth Circuit

PER CURIAM:

Action by air force officer for declaratory and injunctive relief and relief by writ of mandamus or habeas corpus to establish his status as conscientious objector and require air force to assign him to duty consistent with his subjective conscience or accept his resignation. The United States District Court for the District of Colorado, William E. Doyle, J., 267 F. Supp. 701, denied relief, and appeal was taken. The Court of Appeals held that district court lacked jurisdiction to entertain the action in view of officer's failure to exhaust military process beyond administrative remedies under air force regulations.

Affirmed; restraining order continued for 10 days to allow appellant opportunity to pursue certain remedies.

Marvin Karpatkin, New York City (John de J. Pemberton, Jr., Rochester, Minn., American Civil Liberties Union, William F. Reynard, Denver, Colo., Norman Dorsen, and Ernest Angell, Melvin L. Wulf, Eleanor H. Norton and Rhoda H. Karpatkin, New York City, of counsel, were with him on the brief), for appellant.

C. Westbrook Murphy, Dept. of Justice (Barefoot Sanders, Asst. Atty. Gen., Lawrence M. Henry, U. S. Atty., Morton Hollander and Harland F. Leathers, Dept. of Justice, were with him on the brief), for appellees.

Before LEWIS, BREITENSTEIN and HICKEY, Circuit Judges.

PER CURIAM.

This appeal is taken from a judgment of the District Court for the District of Colorado denying to appellant declaratory and injunctive relief and relief by writ of mandamus or habeas corpus in appellant's efforts to establish his present status as a conscientious objector and require the United States Air Force to assign him to duty consistent with appellant's subjective conscience or to accept his resignation as a commissioned officer. Appellant has served as a regularly commissioned officer for over eleven years and his sincerity in advancing his present contentions is not questioned for the purposes of this case. In brief summary, appellant asserts that since the initiation of his voluntary military service he has become a conscientious objector to wars of aggression, particularly to the Vietnam conflict, that he is about to be assigned duty inconsistent with his conscience in such regard, that he has exhausted his administrative remedies, and that, absent judicial shelter at this time, he will be forced by his beliefs to disobey a military order and thus be faced with a court-martial proceeding. The full factual background of the case is set forth in the comprehensive memorandum opinion and order of the trial court, 267 F. Supp. 701. We affirm the judgment for the reasons set forth in the trial court's opinion and adopt his opinion as the opinion of this court, adding only a few comments pertinent to the appellate presentation urged by counsel.

The trial court dismissed appellant's action for lack of jurisdiction and we agree. Although appellant has exhausted his administrative remedies as that term is concerned with Air Force regulations, he has not exhausted

the military process and has not been denied, nor can we anticipate that he will be denied, a full consideration of his constitutional rights within the complete scope of that process. Nor can we at this time give heed to appellant's claim that applicable Air Force regulations pertaining to treatment of in-service personnel do not meet the classical requirements of due process as that concept applies to administrative bodies in general. Military regulations must be considered in the light of military exigencies, "must be geared to meet the imperative needs of mobilization and national vigilance—when there is no time for 'litigious interruption'"[1] and great and wide discretion exists in the executive department both in the formation and application of regulations and in their interpretation in such matters as what constitutes "for the good of the service." And, finally, we cannot review the merits of appellant's present claim that the Air Force in the case at bar did not comply with its own regulations in regard to appellant. Such a claim must indeed be strained to contain an overtone of constitutional invalidity giving rise to immediate judicial review of its application.

Appellant asserts that under the principles announced in Dombrowski v. Pfister, 380 U. S. 479, 85 S. Ct. 1116, 14 L. Ed. 2d 22, he is entitled to injunctive relief to assure determination of his First Amendment right to religious freedom without exposure to court-martial proceedings. We are unwilling to expand the Dombrowski doctrine to enjoin the military actions here under consideration. To do so would run contrary to established law.[2]

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[1] United States v. Nugent, 346 U. S. 1, 10, 73 S. Ct. 991, 996, 97 L. Ed. 1417.

[2] See Wales v. Whitney, 114 U. S. 564, 5 S. Ct. 1050, 29 L. Ed. 277; Gusik v. Schilder, 340 U. S. 128, 71 S. Ct. 149, 95 L. Ed. 146;

The essence of appellant's claim is that the federal judiciary should review and determine the validity of military assignments to duty. This we cannot do.[3]

In order to allow appellant opportunity to pursue his asserted remedies further, the restraining order heretofore issued by this court shall continue in effect for ten days after the filing of this opinion. Thereupon the restraining order shall be dissolved without further order and the mandate shall issue forthwith.

Beard v. Stahr, 370 U. S. 41, 82 S. Ct. 1105, 8 L. Ed. 2d 321; and Gorko v. Commanding Officer, 10 Cir., 314 F. 2d 858.

[3] Orloff v. Willoughby, 345 U. S. 83, 94, 73 S. Ct. 534, 97 L. Ed. 842. See also Reid v. Covert, 354 U. S. 1, 39, 77 S. Ct. 1222, 1 L. Ed. 2d 1148; Burns v. Wilson, 346 U. S. 137, 140, 73 S. Ct. 1045, 97 L. Ed. 1508; Reaves v. Ainsworth, 219 U. S. 296, 306, 31 S. Ct. 230, 55 L. Ed. 225; and Luftig v. McNamara, D. C. Cir. 373 F. 2d 664, 665.

AIR FORCE REGULATION
NO. 35-24

DEPARTMENT OF THE AIR FORCE
Washington, 8 March 1963

Military Personnel

DISPOSITION OF CONSCIENTIOUS OBJECTORS

This regulation establishes uniform procedures for the utilization, assignment, and consideration of requests for separation of conscientious objectors. It implements DOD Directive 1300.6, 21 August 1962.

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SECTION A—GENERAL INFORMATION AND POLICY

1. To Whom This Regulation Applies. This regulation applies to all members of the Air Force. Members of the Reserve components not serving on extended active duty, who fall within the criteria stated in this regulation, will be processed under the specific regulation pertaining to their respective components. This regulation will not be cited as an authority for separation or assignment.

2. Air Force Policy:

a. *Appointment or Enlistment of Conscientious Objectors.* The Air Force does not accept individuals (other than physicians or dentists) who claim conscientious objection to military service for appointment as officers or for enlistment in the active force or the Reserve forces. Cases may arise, however, in which individual members profess a conscientious objection after entering military service.

b. *Recognition of Conscientious Objection.* The fact of conscientious objection does not exempt men from the draft. However, the Congress has deemed it more essential to respect an individual's religious beliefs than to force him to serve in the Armed Forces. Accordingly, bona fide religious objection to participation in war, in any form, has been recognized to the extent that such an objector is not inducted into the Armed Forces but is required to serve his country for the same period of time in civilian work contributing to the maintenance of national health, safety, or interest. Consistent with this national policy, bona fide conscientious objection by a member of the Air Force will be recognized to the extent practicable and equitable.

c. *Claim to Exception From Military Service.* Federal courts have held that a claim to exemption from military service under the Universal Military Training and Service Act must be interposed prior to notice of induction. Failure to make timely claim for exemption constitutes a waiver of the right to claim. Therefore, the Air Force cannot entertain a request for separation based solely on conscientious objection:

(1) Which existed but was not claimed before entry on active duty or enlistment.

(2) Which was claimed, and denied by Selective Service, before entry into military service.

d. *Separation.* No vested right exists for any individual to be separated from military service at his own request before the expiration of his term of service, whether he is serving voluntarily

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This regulation supersedes AFR 39-51, 14 August 1951.

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or involuntarily. Administrative separation before completion of the term of service is discretionary with the Secretary of the Air Force, on the basis of judgment of the facts and circumstances in the case. The Air Force normally will separate members for whom a classification as conscientious objector is recommended (see paragraph 3b), except that a member for whom a 1–A–O classification is recommended will not be separated until he has completed two years of active service (see paragraph 8a(2)).

e. *Utilization and Assignment:*

(1) Individuals inducted into military service, who have previously been classified as 1–A–O by local induction boards, are assigned to noncombatant service. This service, in accordance with the President's Executive Order 10028, 13 January 1949, is defined as:

(a) Service in any unit of the Armed Forces which is unarmed at all times;

(b) Service in the medical department of any of the Armed Forces, wherever performed; or

(c) Any other assignment the primary function of which does not require the use of arms in combat provided that such other assignment is acceptable to the individual concerned and does not require him to bear arms or to be trained in their use. (The term "noncombatant training" shall mean any training which is not concerned with the study, use, or handling of arms or weapons.)

(2) Consistent with the above, members for whom a 1–A–O classification is recommended and who have less than 2 years of active service will be assigned to noncombatant service until completion of 2 years of active duty.

(3) Members of the Air Force assigned to noncombatant service will not be allowed to avoid the important or hazardous duties which are the responsibility of all members of the military organization to which they are assigned.

3. Criteria for Disposition of the Member:

a. *General.* In evaluating a request for separation based on conscientious objection, great care must be exercised to insure the sincerity of the claim. It is essential that procedures not invite or permit abuse by unscrupulous persons who seek to avoid all obligations on the grounds of religious belief. Claims of conscientious objection by all persons, whether existing before or after entering military service, should be judged by the same standards.

b. *Selective Service System Standards.* The standards used by the Selective Service System in determining 1–O or 1–A–O classification of draft registrants before induction are appropriate for application to Air Force personnel who claim conscientious objection after entering military service.

(1) The "1–O classification" does not permit induction into military service but does permit induction into the Alternate Service Plan (Conscientious Objectors' Work Program).

(2) The "1–A–O classification" permits induction into the military service and the inductee is required to perform noncombatant duties.

(3) Either classification requires the individual to fulfill his obligations under the UMT&S Act.

c. *Criteria For Determining Conscientious Objection:*

(1) The criteria for determining conscientious objection (other than the statutory requirement that the objection be religious, as opposed to personal or philosophical) are not absolute objective measurements which can be applied across the board. They are the result of extensive experience and practices which have been upheld in the courts in connection with legal obligations for service. Among the factors to be considered are the individual's:

(a) Membership in a peace church.

(b) Training in home and church.

(c) General demeanor and pattern of conduct.

(d) Employment in defense-connected activities.

(e) Participation in religious activities.

(f) Credibility (and that of persons supporting his claim).

Note: If a member is not liable for induction into the Alternate Service Plan of Selective Service after separation, because of having served 180 days or more, his willingness to engage voluntarily in post-military work of the nature encompassed by the Plan may also be pertinent.

(2) *Church Membership and Church Tenets.* While church membership and church tenets are relevant in determining conscientious objection, they are not compelling. The courts have held that mere membership in a religious group teaching conscientious objection is not an automatic basis for classification as a conscientious objector; nor does membership in a group which does not require conscientious objection constitute an automatic basis for denying such classification. The law does not require affiliation with any particular group in order that an individual may be classified as a conscientious objector.

d. *Objective Consideration.* The evaluation of the sincerity of a claim of conscientious objection

requires objective consideration of professed belief not generally shared by persons in the military service. For that reason, particular care must be exercised not to deny bona fide convictions solely on the basis that the professed belief is incompatible with one's own.

4. Individual Consideration. Each request for separation based on conscientious objection will be handled individually, in accordance with the facts and special circumstances of the case, and the criteria set forth in this regulation. Headquarters USAF will determine final action to be taken.

5. Basis for Disciplinary Action. If, in the judgment of the commander concerned, any individual reassigned to noncombatant duties or returned to his normal duty assignment demonstrates or has previously demonstrated his inability or unwillingness to cooperate in a manner which constitutes the basis for disciplinary action, action will be taken as in the case of any other member of the Air Force who demonstrates similar behavior.

SECTION B—PROCESSING REQUESTS FOR SEPARATION

6. How Cases Will Be Documented and Forwarded:

a. *Submission of Request for Separation.* An officer or an airman who professes to be a conscientious objector may submit a resignation or application for separation to his immediate commander. The commander will forward the case in accordance with the regulation under which submitted, to Hq USAF (AF PMPKA) for final determination. Each forwarding indorsement will include a recommendation of approval or disapproval of the request, with a statement of the reasons therefor. Each echelon of command will forward the case as rapidly as possible, and always within 5 workdays.

(1) An officer may tender his resignation in accordance with paragraph 16, AFR 36–12, 1 July 1960, as amended.

(2) An airman may apply for discharge in accordance with paragraph 3p, AFR 39–14, 1 March 1960, as amended.

(3) A member of a Reserve component may tender his resignation or apply for discharge in accordance with AFRs 45–42 or 45–43, as appropriate.

b. *Documentation Required.* In addition to the documentation required by a(1), (2) and (3) above, each case will include:

(1) Information sheet as outlined in attachment 1, which will be completed by the member requesting separation.

(2) Statement of member as required by c(2) below.

(3) Statement from the base chaplain concerning the case.

c. *Initial Action Upon Receipt of Request For Separation.* Upon receipt of a request for separation, the immediate commander will:

(1) Request a legal officer, or the base personnel officer if a legal officer is not available, to counsel the member concerning the provisions of this regulation, and of Section 3103, Title 38, United States Code. That section provides, in pertinent part, that the separation of any person on the ground that he was a conscientious objector who refused to perform military duty or refused to wear the uniform or otherwise to comply with lawful orders of competent military authority shall bar such person's rights (except Government insurance) under laws administered by the Veterans' Administration based upon the period of service from which discharged or dismissed. The only exception is in cases in which it is established, to the satisfaction of the Administrator, that the member was insane.

(2) After counseling, require the member to sign and date the statement as outlined in attachment 2.

7. Status of Member Whose Request for Separation is Under Consideration. Pending final decision on the case, the member will be assigned duties providing the minimum conflict with his professed beliefs. In this connection, remember that conscientious objection is based upon religious belief. Military personnel who observe Sabbath (from sunset Friday to sunset Saturday) as their regular day of worship rather than Sunday, and whose high holy days fall on weekdays, will be excused from duty to attend their religious services locally if the military situation permits (see AFR 265–1). The member will, nevertheless, be required to maintain the same standards of performance and behavior as other personnel assigned to his unit.

8. Action by Headquarters USAF:

a. *Forwarding Cases to Selective Service.* If a member has less than 2 years' active service, Hq USAF (AF PMPKA) will forward each such case to the Director, Selective Service System, Washington 25, D. C., prior to making a final determination on the case, requesting an advisory opinion as to the member's proper classification under the UMT&S Act. (An advisory opinion

may also be sought from Selective Service on a member with 2 or more years of service.)

(1) A member for whom 1–O classification is recommended by Selective Service will be considered for discharge by reason of his conscientious objection to military service.

(2) A member for whom 1–A–O classification is recommended by Selective Service normally will not be separated if he has less than 2 years' service but will be reassigned to noncombatant duties. An individual so reassigned will be required to sign and date a statement as indicated in attachment 3. Upon completion of 2 years' service he will, if he has a Reserve obligation remaining, be released from active duty and transferred to the Air Force Reserve for completion of his military service obligation under the UMT&S Act.

(3) A member for whom neither 1–O nor 1–A–O classification is recommended by Selective Service will normally be retained in military service, subject to normal duty assignments.

b. *Record of Entry To Be Made.* When a member is separated as a conscientious objector, items 11c and 32, DD Form 214, "Armed Forces of the United States Report of Transfer or Discharge," will be completed as follows:

(1) *Item 11c:*

(a) *Officers*—(SDN 51Q) (citation of instrument directing separation), Conscientious Objection, AFR 36–12.

(b) *Airmen*—(SDN 318) (citation of instrument directing separation), Conscientious Objection, AFR 39–14.

(2) *Item 32:* "Paragraph 11, AFM 39–9, 2 May 1960, as amended, applies."

c. *Character of Separation.* If separation is warranted, the character of separation to be awarded will be determined by the member's military record, the standards established in AFRs 36–12 or 39–10, as appropriate, and the procedural guidelines set forth in this regulation.

9. Notifying Selective Service Regarding a Member Who Has Not Completed 180 Days' Active Duty. Personnel with less than 180 days' service (volunteers or inductees) who are determined to be bone fide conscientious objectors (1–O classification), and whose request for separation is made early enough so that separation occurs prior to completion of 180 days' active duty, will be separated for the convenience of the Government by reason of conscientious objection to permit service in the Conscientious Objectors' Work Program. In such cases, the immediate commander will notify the Selective Service System promptly of the date of separation from military service and the fact that the individual has not completed 180 days' active duty. He will request the Selective Service System to "induct" the individual for the alternate service provided by the UMT&S Act.

10. Exceptions. When an individual who would normally be recommended for a 1–A–O classification has extensive service or there are other unusual circumstances warranting such action, the Secretary of the Air Force may retain the individual in service and direct his reassignment to noncombatant duties. Requests for exception, fully documented, may be forwarded through channels to Hq USAF (AF PMPKA).

11. Disposition of Correspondence. After final action has been taken, the immediate commander will dispose of all correspondence in accordance with AFM 35–9 or AFM 35–12, as appropriate.

BY ORDER OF THE SECRETARY OF THE AIR FORCE

CURTIS E. LeMAY
Chief of Staff

OFFICIAL

R. J. PUGH
Colonel, USAF
Director of Administrative Services

3 Attachments.
1. Required-Information Sheet
2. Statement of Member (Separation)
3. Statement of Member (Reassignment)

REQUIRED-INFORMATION SHEET

Each person who requests separation from the Air Force as a conscientious objector will provide the information indicated below. (The individual may submit other information if he wishes.)

1. Current Information. State your:

a. Full name.

b. AFSN.

c. Selective Service Number.

d. Military address.

e. Permanent home address.

2. General Information. State:

a. Name and address of each school and college you attended, the type of school (public, church, military, commercial, etc.), and dates of attendance.

b. Chronologically all your occupations, positions, or jobs, other than as a student in school or college, in which engaged at any time, whether or not for monetary compensation; include type of work, name and address of employer, and the from/to date for each occupation, position, or job.

c. Addresses and dates of all your former residences.

d. Names and addresses of your parents if living; and indicate whether living or deceased.

e. Each parent's religious denomination or sect.

3. Military Status:

a. Did you apply to the Selective Service System (local board) for classification as a conscientious objector before your entry into the Air Force? If so, to which local board? What was the board's decision (if known)?

b. If you have served less than 180 days in the military service, and are discharged as a conscientious objector, are you willing to perform work under the Selective Service Conscientious Objectors' Work Program? Yes _____ No _____ Will you consent to your local Selective Service board's issuing an order for such work? Yes _____ No. _____

4. Religious Training and Belief:

a. Do you believe in a Supreme Being?

b. Describe the nature of the belief which is the basis of your claim; and state whether or not your belief in a Supreme Being involves duties which to you are superior to those arising from any human relation.

c. Explain how, when, and from whom or what source you received the training and acquired the belief which is the basis of your claim.

d. Give the name and present address of the individual upon whom you rely most for religious guidance.

e. Under what circumstances, if any, do you believe in the use of force?

f. Describe the actions and behavior in your life which in your opinion most conspicuously demonstrates the consistency and depth of your religious convictions.

g. Have you ever given public expression, written or oral, to the views you have expressed herein as the basis of your claim? If so, specify when and where.

5. Participation in Organizations:

a. *Military.* Have you ever been a member of any military organization or establishment before entering the Air Force for this tour? If so, state its name and address, and the reasons why you became a member.

b. *Religious.* Are you a member of a religious sect or organization? If "yes":

(1) State the name of the sect, and the name and location of its governing body or head if known to you.

(2) When, where, and how did you become a member of said sect or organization?

(3) State the name and location of the church, congregation, or meeting you customarily attend.

(4) Give the pastor's or leader's name, title, and present address.

(5) Describe carefully the creed or official statement of your religious sect or organization relative to participation in war.

c. *Other.* Describe your relationships with and activities in all organizations with which you have been affiliated, other than military, political, or labor organizations.

6. References. Give the name, full address, occupation or position, and relationship to you, of persons who can supply information as to the sincerity of your professed convictions against participation in war.

Attachment 1

STATEMENT OF MEMBER

(Separation)

1. I have been counselled concerning possible non-entitlement to benefits administered by the Veterans' Administration due to discharge from the Air Force as a conscientious objector.

2. I understand that a discharge as a conscientious objector, who refuses to perform satisfactory military duty or otherwise to comply with lawful orders of competent military authority, may bar all rights, based upon the period of service from which discharged, under laws administered by the Veterans' Administration except my legal entitlement (if any) to any war risk, Government (converted) or National Service Life Insurance.

(Date) _____ (Signature of Member) _____

(Typed Name, AFSN, Grade, USAF)

The preceding statement of (member's name) was signed by him after he had been counselled by me.

(Date) _____ (Signature of Officer Who Counselled Member) _____

(Typed Name, AFSN, Grade, USAF)

Attachment 2

STATEMENT OF MEMBER

(Reassignment)

1. I have been counselled concerning designation as a conscientious objector. On the basis of my religious belief, I consider myself to be a conscientious objector and am conscientiously opposed to participation in combatant training and service.

2. I request assignment to noncombatant duties for the remainder of my current term of service and/or military obligation.

3. I fully understand that on expiration of my current term of service I am not eligible for voluntary enlistment, reenlistment, or voluntary recall to active service in the Air Force.

(Date) _____

(Signature of Member) _____

(Typed Name, AFSN, Grade, USAF)

Attachment 3